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IN THE

Supreme Court of the United States

OCTOBER, 1976 TERM

No. 76-905

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., *Petitioners*

v.

SECRETARY OF THE ARMY, SECRETARY OF THE AIR FORCE, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
I. Judgment Sought To Be Reviewed	1
II. Jurisdiction	2
III. Questions Presented For Review	2
IV. Constitutional And Statutory Provisions Involved In This Case	4
V. Statement Of The Case	6
VI. Argument	14
A. Issuance Of A Writ Of Certiorari Is Imperative In This Case To Enable This Court To Settle The Vitally Important Federal Question Of Whether Congress Alone Has The Exclusive Power Under The Constitution To Compel Thousands Of Civil Service Employees To Join The Military And To Expose Themselves To Combat Duty As A Condition Of Continued Federal Civilian Employment	14
B. The Civil Service Commission Has No Statutory Authority Of Any Kind From Congress Which Empowers It To Impose Military-Combat Service Requirements On Thousands Of Civil Service Job Incumbents. The Court Of Appeals Erroneously Rules The Commission Has The "Implied Authority" To Impose Such Military Requirements On Job Incumbents	17
C. Congress Has Historically Provided For Completely Separate Organization And Operation Of The Federal Civil Service System And The Armed Forces, With Directives That There Be No Intermingling Of The Two Hence, Congress Clearly Did Not Intend To Give The Civil Service Commission Implied Authority To Require Military-Combat Service As A Condition Of Federal Civil Service Employment	20
D. Certiorari Is Also Imperative In This Case Because The Court Of Appeals' Decision Conflicts With This Court's Recent Decision In	

Page

Hampton v. *Mow Sun Wong*, And With Other Decisions Of This Court Which Have Strived To Protect The Erosion Of Individual Constitutional Rights By The Unwarranted Expansion Of Military Jurisdiction And Controls .. 23

CONCLUSION 28

TABLE OF AUTHORITIES

Arver v. *United States* (Selective Draft Law Cases) 245 U.S 366 16
Grishan v. *Hagan*, 361 U.S. 278, 80 S.Ct. 310 (1960) .. 26
Hampton v. *Mow Sun Wong*, 96 S.Ct. 1895 (1976)..3, 23, 24
Kinsella v. *United States*, 361 U.S. 234, 80 S.Ct. 297 (1960) 26
Lichter v. *United States*, 334 U.S. 742, 68 S.Ct. 1294..15, 16
McElroy v. *United States*, 361 U.S 281, 80 S.Ct. 305 (1960) 26
Parker v. *Levy*, 95 S.Ct. 2547 (1974) 25
Reid v. *Covert*, 354 U.S. 1, 77 S.Ct 1222 (1957) 26
Rolles v. *Civil Service Commission*, 512 F.2d 1319 (1975) 27
United States v. *O'Brien*, 391 U.S. 367, 77, 88 S.Ct. 1673 15
United States v. *Quarles*, 350 U.S. 11, 76 S.Ct. 1 (1955) 26
United States v. *Weller*, D.C.N.D. Cal., 1969, 309 F.Supp. 50, 51 15

OTHER AUTHORITIES:

Article I, Section 8, Constitution of the United States 2, 4, 7, 9, 14, 15, 18, 19, 24
National Guard Technicians Act, P.L. 90-486, § 2(1), 82 Stat. 755, 32 U.S.C. 709 21
Veterans Preference Act 10, 27
5 U.S.C., 3101 and 3301 .....3, 4, 5, 6, 10, 18, 20, 21, 25
32 U.S.C. 22
354 U.S. 40, 41 26
28 U.S.C. 1254 2
28 U.S.C. 2101(c) 2
245 U.S. 379-387 16
334 U.S. 742, 757 17

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PETITION FOR WRIT OF CERTIORARI

Petitioners American Federation of Government Employees, et al hereby respectfully pray for issuance of a writ of certiorari to review the judgment rendered in this case by the United States Court of Appeals for the District of Columbia Circuit, and in support of this petition, petitioners state:

I

JUDGMENT SOUGHT TO BE REVIEWED

The opinion and judgment of the court of appeals to which this petition is directed is set forth in Appendix A. The court of appeals' subsequent orders denying rehearing are contained in Appendix B.

II

JURISDICTION

The judisdiction of this Court is invoked under the provisions of Title 28 U.S.C. 1254 which empowers this Court to review judgments of courts of appeals by writ of certiorari.

The judgment sought to be reviewed was entered on September 15, 1976. A petition for rehearing and suggestion for rehearing *en banc* were thereafter denied by the court of appeals on October 8, 1976. This petition is accordingly filed in the manner prescribed by Title 28 U.S.C. 2101(c) within ninety days after the court of appeals' denial of rehearing on October 8, 1976.

III

QUESTIONS PRESENTED FOR REVIEW

This case presents a basic Constitutional question of overwhelming importance to the entire federal Civil Service System, and indeed to the fundamental separation of powers between the Executive and Congressional branches of our Government, which should be settled by this Court. Both the district court and the court of appeals inexplicably missed and thus completely failed to rule on this essential, decisive threshhold Constitutional issue, which is:

Did the Civil Service Commission violate Article I, Section 8 of the Constitution or the Fifth Amendment, or both, when it acted *administratively, without any specific statutory authority from Congress,* to license the Army and the Air Force to require thousands of Civil Service job incumbents to either (a) qualify for and join the Military Reserve and commit themselves for immediate combat duty in the event of war or other

national emergency or (b) suffer loss of their existing Civil Service positions, as well as their job retention and merit promotion rights under a long-standing array of federal personnel statutes.

The district court and the court of appeals ruled, erroneously petitioners submit, that the Civil Service Commission has the *"implied authority"* under the federal Civil Service laws (Title 5 U.S.C. 3101, 3301) to force the aforementioned multitude of Civil Service job incumbents to make that impossible choice. That ruling thus raises the following additional vitally important questions for review:

1. Does any federal agency, including the Civil Service Commission, have the *"implied authority"* to require citizens of the United States, including federal Civil Service employees, to join the Military and make themselves available for combat duty as a price of preserving in tact their existing federal statutory rights and privileges—or is that power restricted by Article I, Section 8 of the Constitution to Congress *alone,* which must exercise its Constitutional authority through *specific, clear-cut statutory enactments authorizing, in effect, the conscription of a specified class of civilians for involuntary military service?*

2. Does the aforesaid ruling of the district court and court of appeals conflict with the gravamen of this Court's recent decision in *Hampton* v. *Mow Sun Wong,* 96 S.Ct. 1895 (1976), where it was held that the Fifth Amendment prohibits the Civil Service Commission from depriving *even non-citizen aliens* of liberty without due process of law through the device of attempting to expand Commission jurisdiction over the federal Civil Service into areas exclusively reserved for Con-

gress under the Constitution, where Congress has not specifically authorized the Commission so to operate?

3. Did the district court and the court of appeals err by construing Title 5 U.S.C. 3101 and 3301 to give the Civil Service Commission even *"implied authority"* to require military and combat service as absolute conditions of federal Civil Service employment for thousands of Civil Service job incumbents when the record shows (a) that Congress has historically strived to keep the federal military and civil service systems completely separate and apart, and (b) this Court in recent years has constantly ruled that, under the Constitution, the Military must not be permitted to extend military jurisdiction and controls over civilians without *clear-cut, express statutory authority from Congress*—and even then, such enactments by the Congress must be able to withstand full, careful Constitutional scrutiny?

IV

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves mainly the following Constitutional and statutory provisions:

(i) *Article I, Section 8, Constitution of the United States:*

"The Congress shall have Power to . . . provide for the common Defence and general Welfare of the United States. . .;

To raise and support Armies. . . .;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia and for governing such Part of them as may be employed in the Service of the United States, ...;

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

(ii) *Civil Service Laws, 5 U.S.C. 3101*

"General Authority To Employ

Each Executive agency, military department, and the government of the District of Columbia may employ such number of employees of the various classes recognized by chapter 51 of this title as Congress may appropriate for from year to year."

(iii) *Civil Service Laws, 5 U.S.C. 3301*

"Civil Service; Generally

The President may—

(1) prescribe such regulations for the admission of individuals into the *civil service* in the executive branch as will best promote the efficiency of *that service;*

(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

(3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

(iv) *Civil Service Laws, 5 U.S. 2101*

"Civil Service; Armed Forces; Uniformed Services

For the purpose of this title—

(1) the "*civil service*" consists of all appointive positions in the executive, judicial and legislative branches of the Government of the United States, *except positions in the uniform service;*

(2) "*armed forces*" means the Army, Navy, Air Force, Marine Corps, and the Coast Guard; and

(3) "*uniform services*" means the armed forces. . . ."

V

STATEMENT OF THE CASE

Prior to approximately 1960, thousands of federal Civil Service employees were employed by the Army and the Air Force at various military bases and flight centers throughout the United States to perform regular, everyday civilian functions in support of military Reserve units stationed at said military installations. These Civil Service employees performed civilian work similar to that performed by other Civil Service employees for most other federal agencies. For example, they served as clerks, typists, accountants, budget specialists, radio operators, comptrollers, dispatchers, storekeepers, mechanics, telephone operators, warehousemen, welders, truck drivers, etc.

Because these civilian employees were employed exclusively to perform civilian work, they were all appointed to their positions under the Civil Service laws, and they competed for promotions and job retention in the event of Reductions-in-Force exclusively with other Civil Service employees performing similar civilian work, all as provided by the various civilian personnel statutes codified in Title 5, United States

Code. Indeed, by the early 1960s, most of these civilian employees had earned statutory job retention and merit promotion rights in their positions totaling 20 years or more, and there is nothing in the record in this case to indicate they were not performing their Civil Service duties in a perfectly satisfactory manner.

In the late 1950s, however, the Army and Air Force decided that it might improve the combat readiness of various Reserve units if all of these thousands of Civil Service positions were henceforth filled by Civil Service employees who were also required (1) to qualify for and join the military Reserve, and (2) to commit themselves to combat duty with their military Reserve units in the event of a future national emergency.

The Army and Air Force realized they themselves could not lawfully impose these new military service-combat requirements on thousands of Civil Service employees. Under Article I, Section 8 of the Constitution, Congress *alone* has the power "to provide for the common defence" (sic) and to determine which classes of civilians shall be required to join the military and make themselves available for combat in the event of war. Inexplicably however, the Army and Air Force did not seek the necessary statutory authority from Congress. Rather, they simply approached the Civil Service Commission and asked the Commission administratively to approve the imposition of these new military-combat service requirements on the thousands of Civil Service employees hereinabove described.[1]

---

[1] The Army called its proposed plan the "Army Reserve Technician Program". The Air Force program was similarly named the "Air Force Reserve Technician Program". Under these proposed plans, thousands of Civil Service positions would immedi-

The Civil Service Commission likewise took no step to apply to Congress for statutory authority to impose, for the first time in American history, military-combat service requirements on thousands of federal Civil Service employees. The Commission, without citing a single legal authority, statute or precedent to support its action, simply licensed the Air Force and the Army to proceed.

Thousands of federal Civil Service positions were thereupon administratively converted by the Army and Air Force to so-called "ART" positions, and the incumbents of those jobs were notified that unless they promptly joined the military Reserve, they faced the possibility of losing their positions to new or younger Civil Service employees who would agree to join the military. They were told that transfers would be attempted in some cases where other Civil Service openings could be found for those who failed to join the military, or who were not qualified for military service by reason of age, physical disability, or previous military wounds or injuries. Where such openings were not available, however, the prospects were hopeless for those who failed to join the military. Their jobs, and those to which they might otherwise retreat in the event of a Reduction-in-Force or to which they might have otherwise been promoted, had all been converted to "ART"—meaning that henceforth those jobs could be filled only by Civil Service employees who agree to join and qualify for the military Reserve.

ately be designated "ART" positions, henceforth to be filled exclusively wherever possible by Civil Service employees who agreed to join, and were qualified to join, the military Reserve, and who would commit themselves for immediate combat duty with their Reserve units in the event of war. "ART" positions would be placed in new competitive areas and levels separate from "non-ART" positions, so that in the future, only "ART" employees could lawfully compete for retention in or promotion to those positions.

Civil Service job incumbents who could not qualify for the military Reserve because of age, physical disability or prior military wounds or injuries, would be transferred out of their positions to other positions, if other positions could be found. Otherwise, they were doomed sooner or later to lose the position in the event of a Reduction-in-Force or similar personnel procedure, and their promotion rights under existing federal law were effectively nullified.

In sum and substance, therefore, by two mere strokes of the Civil Service Commission's pen, thousands of good, loyal, capable Civil Service employees were subjected to the following *"extra conditions" of civilian federal employment, none of which had been authorized by the Congress as required by Article I, Section 8 of the Constitution, and none of which are required of any other Civil Service employees*:

(i) They were forced to join the military Reserve and constantly to maintain such military status, in order to hold their federal Civil Service positions;

(ii) They were required to invest one weekend each month in military training;

(iii) They were required to serve an additional two weeks of active military duty each year;

(iv) They were required to commit themselves to immediate combat duty in the event of war or other national emergency;

(v) They were required to take periodic military physical examinations to establish their eligibility for continued service in both the military Reserve and their federal Civil Service "ART" positions;

(vi) They were separated from their Civil Service "ART" positions when found not to qualify physically

for military service, albeit the disqualification was in no sense sufficient to remove other federal Civil Service employees from their regular Civil Service positions;

(vii) Those who were Veterans' Preference eligibles entitled to the protections of Title 5 U.S.C. 3312, 3504 were nevertheless denied appointment, promotion, or retention in Civil Service positions solely because they did not meet the age or physical requirements for the military Reserve;

(viii) Those who were incumbents in Civil Service positions suddenly converted to "ART" and who declined or were not qualified for military Reserve membership were confronted with immediate forced transfers to other undesirable positions, if such positions were available; and

(ix) Veterans' Preference Civil Service employees who were ineligible for ART status or who declined military service as a condition of federal Civil Service employment were literally left on *"isolated islands"* for purposes of Reductions-in-Force and promotions, and thus they were always the first to go in a personnel reduction action and they were considered completely ineligible for promotion to higher Civil Service positions in their unit simply because they lacked military standing.

Application of these new military requirements in individual cases was actually brutal and exceedingly arbitrary and capricious. Petitioner Erwin P. Rolf in this action, for example, was a disabled veteran of World War II. *He possessed the highest possible statutory job retention rights under the Veterans Preference Act*, and by 1969, he had rendered 26 years of good, faithful service to the United States as a mechanic at the Air Force Reserve Center in Pittsburg. *Because of his past military disabilties, Rolf was not eligible to join the Air Force military Reserve, so he simply could not qualify for ART status when his position was converted to ART.* In January, 1969, therefore, Rolf was automatically demoted in a Reduction-in-Force to a completely unacceptable job, with great loss of pay, while other mechanics with *far less or no statutory retention rights under the Veterans Preference Act* were retained in their positions simply because they were able to join the military Reserve and attain ART standing. Rolf appealed to the Civil Service Commission, which ruled (J.A. 81):

> "Membership in the Air Force Reserve is a specific requirement for an ART position, not a physical standard. Inability to join the AF Reserve, or unwillingness, precludes the assignment of an applicant or employee to an ART position *and the Commission does not look behind the reasons for the employees' failure to meet the requirements for Air Force Reserve membership.* We hold that your not having been offered assignment to an ART position because of failure to meet the requirements for Reserve membership does not establish improper discrimination against you because of *physical handicap*, notwithstanding the fact that the reason for your failure to meet the requirements for Reserve membership is because you are not *physically qualified.*
>
> "The records show that there are no *non-ART* positions in your competitive area to which you can exercise retreat rights.
>
> *"The agency acknowledges that you are correct when you say that temporary employees are assigned to ART duties. . . . The agency was not required to terminate the temporary appointment of those employees serving in temporary positions*

performing ART work before conducting a Reduction-in-Force, as you contend, because those [ART] positions are not included in your competitive level. . . ." (Italics supplied)

Similarly, petitioners Samuel T. Minnick and Frances E. Morton fell victims to the Army's new military service requirements in the following manner. On May 19, 1969, the Indiantown Gap Military Reservation in Pennsylvania urged Civil Service employees at the Reservation to file their bids for a Grade GS-9 Administrative Assistant job opening (J.A. 83, 84). The notice stated the job would be awarded under the Army's "*Merit Placement and Promotion Program*". Minnick had been a member of the Army's military Reserve for years, but had necessarily retired therefrom. He was eminently qualified for the GS-9 job vacancy, and he was recommended by his superior as "*the best qualified applicant for the position*" (J.A. 84). *Indeed, Minnick was already performing the duties of the vacant position in an acting capacity* (J.A. 84). The Army, however, flatly rejected Minnick and refused even to interview him for the appointment, stating (J.A. 85):

> ". . . he has surpassed the maximum years for retention [in the Army Reserve] and current laws preclude his transfer to active Reserve status. . .
>
> "In view of the above, since Mr. Minnick cannot become a member of the active Reserve, he can no longer be appointed to the [vacant Civil Service] position."

In the case of petitioner Frances E. Morton, she was employed in a Grade GS-6 Civil Service position at the Army Hospital Center in Philadelphia when, on February 19, 1964, her top superior recommended that she

be promoted to a higher vacant Civil Service position. At that time, Ms. Morton had rendered 23 years of outstanding service as a federal Civil Service employee, and in support of the proposed promotion, her superior stated (J.A. 86):

> "Although Ms. Morton is not a Reservist, her past experience and job performance clearly indicate she is the best qualified individual to fill this position."

The Army, however, summarily denied the proposed promotion, stating (J.A. 87):

> "She, like many others, male and female, has been the victim of the Reserve requirement. . ."

Ms. Morton appealed to the Civil Service Commission which refused to intervene, but capriciously stated (J.A. 87):

> "As a non-reservist . . ., her tenure has not been jeopardized by the adoption of the program. *However, because of the nature of the plan, it must be said that her opportunities for promotion to higher-grade . . . positions are limited . . .*
>
> "*We might add that the Commission has been concerned over the degree of limitation that appears to be developing with respect to the reserve eligibility aspects of ART positions. . . .*"
>
> (Italics supplied)

Unfortunately, however, while the Civil Service Commission was expressing meaningless "concern" regarding the "*degree of limitation that appears to be developing*", the Army was simultaneously directing its various Reserve Commands expeditiously *to increase the number of positions sealed off for ART-*

Military Civil Service personnel only to 6000 (J.A. 91).

Clearly, therefore, the time has arrived when it is absolutely imperative for this Court to rule on the basic question of whether the Civil Service Commission violated Article I, Section 8 and/or the Fifth Amendment to the Constitution when it licensed, for the first time in American history, the imposition of military-combat service requirements on thousands of federal Civil Service employees—and whether the right to require such military service as a condition of federal civilian employment is vested by the Constitution in Congress *alone*.

VI

ARGUMENT

A. Issuance Of A Writ Of Certiorari Is Imperative In This Case To Enable This Court To Settle The Vitally Important Federal Question Of Whether Congress Alone Has The Exclusive Power Under The Constitution To Compel Thousands Of Civil Service Employees To Join The Military And To Expose Themselves To Combat Duty As A Condition Of Continued Federal Civilian Employment.

As stated above, both the district court and the court of appeals failed to rule on the vitally important basic constitutional question necessarily presented by this case for decision.

Article I, Section 8 of the Constitution plainly prescribes that Congress alone has the *exclusive power* "to provide for the common Defence"; "to raise and support armies"; to "make Rules for the Government and Regulation of the land and naval Forces"; to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"; "to provide for organizing, arming, and

disciplining the Militia, for governing such part of them that may be employed in the Service of the United States"; and finally, to "make *all* Laws which shall be *necessary* and *proper* for carrying *into Execution* the foregoing Powers, and all other Powers vested by [the] Constitution in the Government of the United States, *or in any Department or Office thereof.*"

In *United States* v. *O'Brien,* 391 U.S. 367, 77, 88 S.Ct. 1673, this Court construed Congress' last mentioned powers under Article I, Section 8 as follows, at page 77:

> "The constitutional power of Congress to raise and support armies and to make *all* laws necessary and proper to that end is broad and sweeping. Lichter v. United States, 334 U.S. 742, 755-758, 68 S.Ct. 1294, 1301-1303, 92 L.Ed. 1694 (1948); Selective Draft Law Cases, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918); See also Ex Parte Quinn, 317 U.S. 1, 25-26, 63 S.Ct. 1, 9-10, 87 L.Ed. 3 (1942). The power of Congress to classify and conscript Manpower for military service is 'beyond question'. Lichter v. United States, *supra,* 334 U.S. at 756, 68 S.Ct. at 1302; Selective Draft Law Cases, *supra.* Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system . . ."

It is equally well established that *neither the President himself nor any other agency of the Executive Branch* has the constitutional power to raise an army or other military force through the conscription or induction of involuntary manpower unless and until that authority is *specifically granted* to the Executive by *Congressional legislation* (*United States* v. *Weller,*

However, the court of appeals went on to rule, completely erroneously we submit, that somehow Title 5 U.S.C. 3101 and 3301 can be read to give the Commission the *"implied authority"* to impose such military-combat service requirements on thousands of Civil Service job incumbents as and when it sees fit.

Title 5 U.S.C. 3101 states merely:

> "Each Executive agency, Military department, and the government of the District of Columbia may employ such number of employees . . . as Congress may appropriate from year to year."

Certainly, there is absolutely nothing in that section which even remotely suggests Congress intended to surrender its entire Article I, Section 8 *"Military Powers"* to the Civil Service Commission, same to be executed at the Commission's whim, as and when it sees fit, upon the entire Civil Service System, or upon selected portions of the nation's Civil Service job incumbents.

Title 5 U.S.C. 3301, in turn, provides:

> "The President may—
>
> (1) prescribe regulations for the *admission of individuals into the civil service* in the executive branch as will best promote the efficiency of that service;
>
> (2) ascertain the fitness of *applicants* as to age, health, character, knowledge, and ability for the employment sought;
>
> (3) make and prescribe the duties of individuals *to make inquiries* for the purpose of this section." (Italics supplied)

Again, however, there is absolutely nothing in this section which, when read separately or in combination

with Section 3101, *supra,* even remotely suggests that Congress here intended completely to surrender *carte blanche* its Article I, Section 8 *"Military Powers"* to the Civil Service Commission, same to be imposed by the Commission upon thousands of hapless Civil Service *job incumbents* without further consultation with or additional specific legislative authority from Congress.

In fact, Section 3301, by its own terms, is not even applicable to Civil Service *job incumbents* such as those involved in the case at bar. Rather, it is restricted specifically to mere *"applicants" for Civil Service employment,* and it empowers the Commission simply to—

> "prescribe regulations for the *admission* of individuals INTO *the Civil Service* . . . as will best promote the efficiency of that service . . . " (Italics supplied)

At the very best, therefore, Section 3301 empowers the Commission to prescribe conditions upon the employment of *new "applicants"* for *"admission into the civil service,"* and to ascertain "the fitness of *applicants* as to age, health etc." In no way or manner does it expressly or impliedly, directly or indirectly, authorize the Commission suddenly to determine that long-standing Civil Service *job incumbents* must either join the Military and commit themselves to combat duty as a price for retaining Civil Service positions they already hold, and which, in many cases, they have held for a long as 20 years or more.

Plainly, the court of appeals committed grievous error when *first,* it read Sections 3101 and 3301 to grant the Commission *"implied authority"* to require *mili-*

tary-combat service as a condition of federal *civilian* employment for any *Civil Service employee or applicant for Civil Service employment,* and *secondly,* it *indiscriminantly* read Section 3301 to apply not only to *applicants* for admission to the Civil Service, but to long-standing Civil Service job incumbents as well.

C. Congress Has Historically Provided For Completely Separate Organization And Operatior Of The Federal Civil Service System And The Armed Forces, With Directives That There Be No Intermingling Of The Two. Hence, Congress Clearly Did Not Intend To Give The Civil Service Commission Implied Authority To Require Military-Combat Service As A Condition Of Federal Civil Service Employment.

Instead of seeking to grant the Civil Service Commission "implied authority" to impose military-combat service requirements on Civil Service employees as a condition of federal civilian employment as held by the court of appeals, Congress has actually strived to provide that there be no intermingling of the *civilian* and *military* services of the Government.

First, Congress has carefully codified all the various statutes governing the Civil Service in Title 5, United States Code, entitled *"Government Organization and Employees",* while the various statutes governing military personnel have been codified in Title 10, United States Code under the heading *"Armed Forces".*

Title 5, governing the Civil Service System, contains provisions for examinations, certifications and appointments to the Civil Service (5 U.S.C. 3301-3364); training of Civil Service personnel (5 U.S.C. 4101-4118); performance ratings for Civil Service employees (5 U.S.C. 4301-4308); pay scales for civilian employees (5 U.S.C. 5101-5946); the rights of Civil Service labor unions (5 U.S.C. 7101) and so forth.

Title 10, on the other hand, entitled *"Armed Services",* provides for the completely separate organization of the various military services and the Department of Defense (10 U.S.C. 101-139), and under the heading *"Personnel",* Congress has enacted a totally separate statutory scheme to cover military enlistments (10 U.S.C. 501-540); appointments to 'regular components' and to Reserve organizations (10 U.S.C. 541-650); and to establish a Military Code of Justice (10 U.S.C. 801-950) etc.

And, as stated above, *at no point has Congress passed any law, as part of either Title 5 or Title 10, which authorizes any federal agency to make military-combat service a condition of federal Civil Service employment.*

Indeed, at the very outset of the Civil Service laws, Congress went to great pains carefully *to separate, by definition,* the *"Civil Service"* from the *"Armed Services"* (See Title 5 U.S.C. 2101).

More recently, Congress was even more decisive when it enacted the *National Guard Technicians Act,* Public Law 90-486, § 2(1), 82 Stat. 755, 32 U.S.C. 709. There, Congress authorized the Secretary of the Army and the Secretary of the Air Force to employ civilian technicians (1) to train the National Guard and (2) to engage in supply, maintenance and repair activities for the National Guard. Section 709(b) of Title 32 then states:

> "(b) . . . a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position."

But Congress, having authorized the possibility of such a dual civilian-military status for National Guard Technicians in Section 709(b), was quick to emphasize in Section 709(d) of Title 32:

> "(d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. *However, a position authorized by this section is outside the competitive [Civil] service if the technician employed therein is required under subsection (b) to be a member of the National Guard."* (Italics supplied)

Hence, two conclusions are unavoidable and absolutely compelling:

(1) If the Army and Air Force had to apply to Congress for *statutory authority* to operate their National Guard Technician programs in the manner specified in Title 32 U.S.C. 709, *they cannot constitutionally operate the Reserve Technician programs involved in this case without like statutory authority from Congress,* and

(2) Congress, when requested to approve even the slightest degree of intermingling of federal military and civilian service, has made it clear *that if military service is to be a required condition of civilian service, then the civilian employee must be appointed to a position* OUTSIDE *the federal Civil Service System.* In other words, the imposition of military service as a prime condition of employment, may *not* be imposed in such manner as to disrupt the normal statutory functioning of the Civil Service System or to effectively repeal the array of statutes found in Title 5, United States Code, which guarantee constant protection of

Civil Service employees' job retention and merit promotion rights and benefits.

D. Certiorari Is Also Imperative In This Case Because The Court Of Appeals Decision Conflicts With This Court's Recent Decision In *Hampton* v. *Mow Sun Wong*. And With Other Decisions Of This Court Which Have Strived To Protect The Erosion Of Individual Constitutional Rights By The Unwarranted Expansion Of Military Jurisdiction And Controls.

In *Hampton* v. *Mow Sun Wong,* 96 S.Ct. 1895 (1976), this Court recently invalidated Civil Service Commission regulations which excluded all persons but American citizens from employment in the federal service, stating at 96 S.Ct. 1905:

> ". . . . ineligibility for employment in a major sector of the economy . . . is of sufficient significance to be characterized as a deprivation of an interest in liberty. Indeed, we deal with a rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis. By reason of the Fifth Amendment, such a deprivation must be accompanied by due process."

In the case at bar, the actions of the Civil Service Commission have equally deprived a discrete class of thousands of Civil Service employees throughout the United States of both their *liberty* (the right to remain free of military-combat service requirements unless Congress mandates it) and their *property* (their lawful Civil Service positions and *statutory* job retention and merit promotion rights). Plainly, if the Fifth Amendment protects aliens who have not yet entered the Civil Service against such deprivations, it equally protects *citizen* Civil Service *job incumbents* against the taking of *both* their *liberty* and *property* without due process of law.

Furthermore, in *Mow Sun Wong*, this Court ruled that *only the Congress, and possibly the President, had the necessary Constitutional authority, to bar aliens from employment in the federal service,* and that—

> "It is perfectly clear that neither the Congress nor the President has ever required the Civil Service Commission to adopt the citizenship requirement as a condition of eligibility for empolyment in the Federal Civil Service."

This Court thus concluded that the Commission's regulations were *devoid of statutory authority,* and that accordingly the Commission had unlawfully attempted to legislate for reasons "the Congress or the President might deem sufficient to justify the exclusion of noncitizens from the federal service" (96 S.Ct. 1905, 1906). *But, this Court held that none of those reasons were either the Commission's business or the Commission's responsibility, and hence only Congress or the President had the necessary Constitutional authority to act.*

In the case at bar, the picture is even clearer. Article I, Section 8 of the Constitution states that Congress, and Congress *alone,* has the necessary authority to require citizens to forego both their *liberty* and *property* if necessary to render *military-combat service* to the United States. And, Congress *alone* has the Constitutional authority to determine which discrete class of citizens shall be called upon to make that sacrifice. *Obtaining military personnel for the Army and Air Force, or providing for a greater military readiness by the Army and Air Force, are plainly not the business or responsibility of the Civil Service Commission.*

A fortiori, the court of appeals patently erred when it ruled: "We think that *Mow Sun Wong* supports, rather than undermines, our conclusion that establishment of the ART programs was a proper exercise of the Commission's authority under . . . 5 U.S.C. § 3301."

As indicated above, 5 U.S.C. 3301 is not even applicable to Civil Service *job incumbents.* It is restricted exclusively to "*applicants . . . for admission to the federal Civil Service*", and it contains *nothing* in the way of a Congressional directive to the Civil Service Commission to adopt a military-combat service requirement as a prime condition of federal Civil Service employment for thousands of Civil Service job incumbents.

Moreover, in recent years, this Court has repeatedly ruled that the United States must constantly be on guard against the erosion of individual constitutional rights which automatically follows the unlawful expansion of military jurisdiction and controls over civilians.. In its recent decision in *Parker* v. *Levy,* 95 S.Ct. 2547 (1974), this Court stated, at pages 2555, 56:

> "This Court has long recognized that the *military* is, by necessity, a specialized society separate from *civilian* society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or to be ready to fight wars should the occasion arise" *Toth* v. *Quarles,* 350 U.S. 11, 17, 76 S.Ct. 1, 5, 100 L.Ed. 8 (1955) . . . . More recently we noted that '(t)he military constitutes a specialized community governed by a separate discipline from that of the civilian', *Orloff* v. *Willoughby,* 345 U.S. 83, 94,

73 S.Ct. 534, 540, 97 L.Ed. 842 (1953), and that 'the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . .' *Burns* v. *Wilson,* 346 U.S. 137, 140 73 S.Ct. 1045, 97 L.Ed. 1508 (1953). . . .

"Just as military society has been a society apart from civilian society, so '(m)ilitary law . . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.' *Burns* v. *Wilson, supra,* 346 U.S, at 140, 73 S.Ct. at 1047."

Thus, in recent years, this Court has repeatedly ruled that *even Congress' exclusive power to raise and regulate armies and military personnel is effectively restricted by other provisions of the Constitution in cases where Congress has sought to extend military requirements over various civilians who were unwilling to accede to such military requirements* (*United States* v. *Quarles,* 350 U.S. 11, 76 S.Ct. 1 (1955); *Reid* v. *Covert,* 354 U.S. 1, 77 S.Ct. 1222 (1957); *Kinsella* v. *United States,* 361 U.S. 234, 80 S.Ct. 297 (1960); *Grishan* v. *Hagan,* 361 U.S. 278, 80 S.Ct. 310 (1960); *McElroy* v. *United States,* 361 U.S. 281, 80 S.Ct. 305 (1960)).

In *Reid* v. *Covert,* for example, this Court struck down a provision of the Uniform Code of Military Justice, enacted by the Congress pursuant to the powers granted by Article I, Section 8 of the Constitution, which subjected *civilians* to trials before military tribunals, stating at 354 U.S. 40, 41:

"We should not break faith with this nation's tradition of keeping military power subservient to civilian authority, a tradition we believe is firmly embodied in the Constitution. The country has remained true to that faith for almost one hundred seventy years. . . .

"Ours is a government of *divided authority* on the assumption that *in division* there is not only strength but freedom from tyranny." (Italics supplied)

A fortiori, appellants submit that in light of the numerous restrictions recently placed even on Congress' exclusive power to subject civilians to military service and military controls, this is hardly the time for courts in the federal system to agree that suddenly the Executive Branch has some vague, inherent constitutional power to compel thousands of *incumbent federal civilian employees to join the military, to commit themselves to combat service and to subject themselves simultaneously to the separate demands of both military and civilian law*—all as a price for simply (a) *continuing to hold the same federal position they have held for years,* or (b) gaining eligibility for a *civilian promotion,* or (c) protecting their clear-cut job retention rights under the Veterans Preference Act in the event of reductions-in-force.

Indeed, the unconstitutional mischief inherently involved in such a system was graphically demonstrated in *Rolles* v. *Civil Service Commission,* 512 F.2d 1319 (1975), where the Court of Appeals for the District of Columbia Circuit invalidated the attempted removal of a Civil Service job incumbent from his civilian position solely because he had fallen into disfavor with his military superior in the Air Force Reserve under the Air Force ART program challenged in this case. The court of appeals stated, at page 1328:

"It is obvious to us that such a procedure lacks even a semblance of due process. It is, in fact, no process at all upon which valuable property interests can be lost. If this Court is here for any purpose, it is to prevent the injustice and unfairness witnessed in this case."

CONCLUSION

This petition for certiorari should be granted, failing which the Civil Service Commission will be left free to impose, in its sole discretion, military-combat service requirements on any and all federal Civil Service positions, and to utilize that device administratively to repeal the Fifth Amendment for federal Civil Service job incumbents and to render meaningless all the merit promotion and job retention statutes enacted by Congress over the years to preserve the sanctity of the Civil Service System.

Respectfully Submitted:

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Certificate of Service

Copies of this Petition for Writ of Certiorari were served by mail this 30th day of December, 1976 to Mrs. Mary Elizabeth Medaglia, Assistant United States Attorney, U.S. Courthouse, 3rd & Constitution Avenue, N.W., Washington, D. C., attorney of record for respondents herein.

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1091

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., APPELLANTS

v.

MARTIN R. HOFFMAN, SECRETARY OF THE ARMY, ET AL.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil 74-70)

Argued February 27, 1976

Decided September 15, 1976

Judgment entered this date

Edward L. Merrigan for appellants.

Mary-Elizabeth Medaglia, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry* and *Ellen Lee Park*, Assistant United States Attorneys, were on the brief, for appellees.

Before WRIGHT, MCGOWAN and TAMM, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* MCGOWAN.

MCGOWAN, *Circuit Judge*: This appeal from the District Court presents a variety of issues concerning the legality of the Reserve Technician Programs of the Air Force and the Army, under which civilian employees performing support and maintenance functions for the Air Force and Army Reserves are required, as a condition of employment, to maintain active membership in the reserve unit which they are serving. Appellants American Federation of Government Employees (AFGE), a labor organization representing large numbers of these civilian employees, and five individual employees of the Air Force and the Army, challenge the Reserve Technician Programs as

(1) totally lacking statutory authorization;

(2) contrary to several provisions of the federal civil service laws, as well as the National Guard Technicians Act of 1968, 32 U.S.C. § 709 (1970), which appellants interpret as indicating a congressional intent to keep the federal competitive civil service completely separate from the armed forces;

(3) violative of the Veterans' Preference Act of 1944, *as amended*, 5 U.S.C. §§ 3309-12, 3351, 3363, 3501-04 (1970); and

(4) inconsistent with the Civil Service Commission's initial agreements with the Air Force and the Army establishing the programs.

The District Court concluded that these contentions were without merit. 387 F. Supp. 63 (1974). For the reasons set forth below, we affirm.

I.

A.

In a letter dated June 25, 1957, the Civil Service Commission (CSC) authorized the Air Force to proceed with its Air Reserve Technician plan (hereinafter ART).[1] The primary goal of the plan was to increase the combat readiness of Air Force Reserve units, as well as their effectiveness in the event of mobilization. Prior to ART, the Air Reserve Flying Centers utilized for training Air Reserve Wings were maintained and operated by Air Force units which were composed of approximately half military and half civilian personnel and were organizationally separate from the reserve wings. ART, by replacing military support personnel with civil servants[2] and requiring civilian support personnel to be active reserve members, in effect integrated the support organizations into the Air Reserve Wings. In their civilian capacity, ART incumbents were to provide the basic maintenance and supply functions previously provided by the support organization; in their military capacity, ART employees were to provide training for the remainder of the wing personnel, who reported only on weekends and during summer active duty tours.[3] Since this "hard core" of highly skilled reservists would be available for imme-

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[1] For purposes of most issues raised in this case, the Air Force and Army Reserve Technician programs are equivalent and will be collectively referred to as "ART." Where greater specificity is required, the Air Force and Army programs will be identified accordingly.

[2] Military support personnel were transferred to regular Air Force units.

[3] ART incumbents receive the regular pay for their civilian jobs, plus military pay for their weekend and summer active duty tours.

diate mobilization, the Air Force anticipated that combat readiness would be enhanced.[4]

In the letter of authorization, CSC indicated that ART was approved on the basis of two understandings with the Air Force: first, "that the Department of the Air Force will carry out both in letter and spirit the commitments it has made and the safeguards it has promised to apply with respect to employees who would be affected by the Plan"; second, that the Department's activities under the plan would comply with the Veterans' Preference Act of 1944. Appellants' Brief at 19a. In a subsequent letter describing ART to central and regional office officials of CSC, the Commission reiterated that the plan was approved only after it was satisfied "that no civilian employees presently on the roles will be adversely affected." CSC Letter No. 57-45, June 28, 1957, Appellants' Brief at 1a. The letter went on to explain that civilian employees in positions to be included within the ART program would be given a choice: if they already belonged, or were willing to join, the local reserve wing they would be given the opportunity to become Air Reserve Technicians; if they declined or were not eligible for reserve membership, they would be reassigned at the same or higher grade to non-ART jobs in the same geographic area, as jobs became available. With respect to employees choosing the latter course, the CSC noted that the Air Force had committed itself "that there will be no reductions in force, no demotions, and no required transfers to other geographic areas for the purpose of effectuating the ART program." *Id.* at 3a. At the same time, the Commission's letter made clear that reserve membership was a condition of employment for ART positions, and, subject to the protection afforded incum-

[4] It was anticipated that approximately 20% of each reserve wing would be composed of ART personnel.

bents in positions taken over by ART, job openings would be filled by persons eligible for and willing to accept active membership in the reserves.

For purposes of its reduction-in-force regulations, 5 C.F.R. Part 351 (1976), the Commission later determined that ART and non-ART positions should be placed in separate competitive levels, *see id.* § 351.403, because of the reserve membership requirement. As a consequence of this determination, non-ART personnel subjected to a reduction-in-force, unless willing and able to meet the reserve requirement, would not have the right to "bump" ART personnel, even if the ART employees had lower retention standing. *See generally id.* §§ 351.401-.705. However, in accordance with the initial understanding between the Air Force and CSC, nonreservist incumbents of ART positions were not placed in a separate competitive level from ART personnel fulfilling the reserve requirement.[5] In addition, under the terms of a 1961 agreement between CSC and the Air Force governing assumption of non-ART work by ART organizations, non-ART personnel would not be deemed to occupy a separate competitive level when the ART program took over activities previously performed by non-ART employees.[6]

[5] *See* CSC Handbook X-151, Recruitment of Air Reserve Technicians Through Competitive Examination (April 1958), *appended to* Record at 9, at A-2; FPM Supp. (Internal) 930-71, Recruitment of Air Reserve Technicians Through Competitive Examination, AF Attch. 6, at A-3 (August 1966). Presumably as a means of enforcing this safeguard, a 1961 agreement between the Air Force and CSC provided that incumbents in non-ART positions generally were not to spend more than 30% of their time carrying out ART duties. *See* Letter of June 6, 1961, AF Exh. 3, at 21-22, ¶ 2.

[6] The 1961 agreement provided in relevant part:

> Whenever the consolidation of non-ART activities with ART activities results in the assumption in ART jobs of

The 1961 agreement also provided, however, that the Air Force could "conduct whatever future reductions may be necessary to bring the non-ART activity down to the level which will continue after consolidation" of ART and non-ART functions, and that the separate competitive level approach would be followed in carrying out these reductions. Letter of June 6, 1961, AF Exh. 3, at 21-22, ¶ 1.

The agreement further stated:

> Reductions in ART and non-ART positions will be generally proportionate to the reductions in ART and non-ART work which occasioned the personnel reductions. If no specific reduction in work is involved, and the curtailment in numbers of positions results from a general "belt-tightening" or across-the-board type of reduction and reorganization, the reduction in ART and non-ART positions will be generally proportionate. Action will be taken to assure that reductions of this type are not organized so as to discriminate against non-ART and status quo personnel.

Id. ¶ 4.

> non-ART duties and the non-ART portion represents a significant part of the job (generally over 30%) the basis for separate competitive levels will disappear. When this happens all non-ART employees who are in the competitive level of the ART job which incorporates 30% or more non-ART duties and who cannot be assigned to non-ART positions in the geographic area without loss of grade may then compete for jobs in the ART organization without regard to the reserve membership requirement. This means they may compete first for jobs in the ART organization in the competitive level of the job containing the non-ART duties as if they were in that competitive level, and second may be given their normal reassignment or retreat rights to other jobs for which they are qualified without regard to the reserve membership.

Letter of June 6, 1961, *supra* note 5, ¶ 3.

Appellants John S. Guttenberger, Ronald R. Meadows, and Erwin P. Rolf were non-ART Air Force employees affected by reduction-in-force actions. Guttenberger and Meadows were preference eligible civil servants, *see* 5 U.S.C. § 2108 (1970), employed as powered ground equipment mechanic leaders at McGuire Air Force Base in New Jersey. Neither was a member of the active reserves. On May 6, 1969, they received notice of a reduction-in-force and were given offers of reassignment to the position of powered ground equipment mechanic. Guttenberger accepted the offer; Meadows refused and was separated on June 29, 1969.[7] Both appealed to the CSC's Regional Office in New York, on the grounds that the duties of their positions were being taken over by ART personnel, and ART employees with less job retention rights under the Veterans' Preference Act were being retained in favor of them. By virtually identical letters of August 14, 1969, the Regional Office denied Guttenberger's and Meadows' appeals, asserting that the reduction-in-force was the result of fund limitations,[8] and that "[t]he duties formerly performed by you are not being performed by the Air Reserve Technicians but are being absorbed by other civilian employees or military personnel." Appellees' Brief at 33, 36. The letters conceded that ART positions were in a separate competitive level from non-ART positions but noted that this difference in treatment complied with the applicable reduction-in-force regulations. Neither Guttenberger nor Meadows appealed to the CSC Board of Appeals and Review.

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[7] Meadows later accepted reinstatement to the position of power generating equipment mechanic. Appellees' Brief at 8 n. 9.

[8] This ground had been clearly identified in the May 6, 1969 notices of reduction-in-force. *See* AF Exh. 1, at 18; AF Exh. 2, at 19.

Rolf was a preference eligible civilian employee in the position of flightline mechanic at an Air Force Reserve Center in Pittsburgh, Pennsylvania. On January 7, 1969, he was notified of a reduction-in-force eliminating his position. Since Rolf failed to meet the physical requirements for reserve membership he was not offered a transfer to a position as a flightline mechanic in the ART program, and instead accepted the position of warehouseman. Rolf appealed the reduction-in-force to the Philadelphia Regional Office of the CSC, contending that refusal to allow him to transfer to an ART position because of his physical handicap was a violation of the Veterans' Preference Act and the statutory provision governing reductions-in-force, 5 U.S.C. § 3502, and that his position was abolished so that ART could take over the functions he had performed.[9] The Regional Office rejected these contentions on the grounds that reserve membership is a requisite for an ART position and Rolf was therefore not qualified for transfer into ART, and that the reduction-in-force resulted from elimination of the non-ART function of conducting combat readiness training, a function unrelated to the reserve mission of the

[9] Rolf also argued that it was improper to retain temporary employees in ART positions while denying him a transfer into ART, and that his job had included a considerable amount of ART work and therefore he was entitled to the same treatment as an ART incumbent. The Regional Office acknowledged that temporary employees were placed in ART positions but pointed out that these temporary positions were fully authorized, that the reduction-in-force regulations do not provide for placement of career employees in temporary slots, and that the temporary ART positions occupied a separate competitive level from Rolf's position. Although the Regional Office did not specifically address Rolf's claim that he was entitled to ART incumbent status, there is some evidence in the record that such status was properly denied, *see* AF Exh. 3, at 37, and in any event Rolf did not press this argument either in the District Court or before this court.

installation. *See* Letter of April 22, 1969, Appellees' Brief at 38-40. Rolf appealed to the CSC Board of Appeals and Review, which issued a decision affirming the Philadelphia Regional Office.[10]

B.

On July 5, 1960, the CSC approved an Army proposal for establishment of a Reserve Technician program almost identical to the Air Force ART program. Like the Air Force plan, the chief goal of the Army's proposal was to achieve maximum combat readiness of its reserve units. Again, CSC approval was granted on the basis of understandings that promised safeguards and commitments with respect to affected employees would be carried out and that operations under the plan would be conducted in compliance with the Veterans' Preference Act. A "Memorandum of Understanding" appended to the letter of approval delineated the promises and commitments which the Army had made, including a promise that "[t]he lack or involuntary loss of military status will not be a basis for removing present or future civilian employees," and a commitment that nonreservist incumbents in ART positions—if they could not be reassigned —would be replaced only through normal attrition or turnover so long as they performed their civilan functions in a satisfactory manner. While the Memorandum provided that "any available qualified civilians, including

[10] *In re* Erwin P. Rolf, August 7, 1969, Appellees' Brief at 41-43.

Before the Board of Appeals and Review, Rolf supported his contention that the Veterans' Preference Act had been violated with the argument that it was inconsistent to deny him an ART position on the ground that he was ineligible to join the reserves. while allowing ART incumbents who no longer satisfied the reserves' physical standards to remain on the job. Although this argument was not addressed by the BAR, it appears to lack force. *See* note 29 *infra*.

women" would be appointed to ART positions when persons fulfilling the reserve requirement were not available, it made no promises that nonreservist incumbents in ART positions would be considered for promotions within the program on an equal footing with reserve members. *See* Appellees' Brief at 31.

In November, 1960 the CSC issued a manual entitled "Recruitment of Army Reserve Technicians Through Competitive Examination," FPM Supp. (Internal) 930-72, which established guidelines for personnel operations within the Army's ART program. These guidelines substantially tracked the ones previously established for the Air Force:[11] reserve membership was specified as a condition of employment, and ART and non-ART positions were placed in separate competitive levels, but nonreservists occupying positions converted to ART could continue to serve in them until reassigned to non-ART positions of the same or higher grade in the same geographical area. The manual confirmed the Memorandum of Understanding's commitment to appoint nonreservists to ART positions in the absence of qualified candidates willing and able to join the reserves, but emphasized that these nonreservists—like nonreservists carried over from positions pre-dating ART—would be subject to reassignment. Nonreservist incumbents of ART positions, whether hired prior or subsequent to the ART reorganization, were not promised equal consideration for promotions with applicants satisfying the reserve requirement.

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[11] Indeed, the major differences between FPM Supp. (Internal) 930-71, promulgated to guide civil service examiners with respect to the "Recruitment of Air Reserve Technicians Through Competitive Examination," and FPM Supp. (Internal) 930-72 appear to be the inclusion within the former of the 1961 agreement between the Air Force and CSC concerning the assumption of non-ART work by ART organizations, and the inclusion within the latter of the 1960 Memorandum of Understanding between the Army and CSC.

This policy was reiterated in Army Reserve Reg. 140-315 (May 1, 1963), Army Exh. 3, ¶ 4.b. which stated:

> In filling vacant positions, qualified candidates who are members of the Ready Reserve or who are eligible and willing to become members of the Ready Reserve . . . will be given priority in selection. However, in those situations where eligibles meeting the dual status condition are not readily available and the needs of the service dictate that the vacancy be filled in a timely fashion, a qualified nonreservist candidate may be selected to fill the position.

Appellants Samuel T. Minnich and Frances E. Morton were nonreservists employed in civilian positions with the Army at the time of the ART reorganization. Pursuant to the Memorandum of Understanding and FPM Supp. (Internal) 930-72, they were reassigned to equivalent positions within the ART program, pending transfer to appropriate non-ART jobs. However, both were ultimately denied promotions to higher positions within ART when they were unable to meet the requirements for reserve membership.

Minnich, a preference eligible employee and member of the Army's Retired Reserve, applied for a promotion to the position of ART staff administrative assistant at Indiantown Gap Military Reservation in Annville, Pennsylvania. Minnich was tentatively selected for the job, pending satisfaction of the reserve requirement, but on May 7, 1969 was denied the promotion when his age prevented him from qualifying for the active reserves. Several months prior to this action, an official of appellant American Federation of Government Employees had written to the CSC, protesting what he called "open defiance and glaring violation" of the 1960 Memorandum of Understanding with respect to promotions in Minnich's Army unit. Letter of January 15, 1969, Exh. B. In response, the director of CSC's Bureau of Inspections had explained:

> Although the Department of the Army affords Reserve members priority in hiring and promotion to higher grade technician positions, no action has been taken to adversely affect employees who were initially appointed in the absence of job applicants eligible for Reserve membership. However, if a qualified Reserve member and a qualified non-Reservist both apply for the same position, the reserve member will be given priority consideration.

Letter of Feb. 13, 1969, Exh. C.

Morton applied for a promotion to the position of administrative assistant in the ART program at the Army Hospital Center in Philadelphia. After being denied the promotion, she filed a grievance with the Army claiming sex discrimination. On February 20, 1967, the Deputy Equal Employment Opportunity Officer for the Installation dismissed her grievance, ruling that her promotion was refused not as a result of sex discrimination but instead because she did not satisfy the reserve membership requirement for the position. J.A. 140. While her appeal was pending within Army channels, Morton was offered a promotion to a staff administrative specialist position, conditioned upon fulfillment of the reserve requirement. On January 5, 1968, this promotion was also refused, since Morton was unable to satisfy the physical requirements for reserve membership. *See* Army Exh. 4. Morton then reinforced her sex discrimination claim by citing several men who were promoted within the ART program notwithstanding failure to satisfy the reserve requirement. On January 17, 1968 the Army rejected Morton's claim with the following explanation:

> The fact that there are non-reservists, including yourself, in Army Reserve Technician positions is readily acknowledged. As you are aware, the policy is to appoint and promote reservists when such personnel are available. When Reservists are not available, non-reservists, including women, are considered.

Exh. F, ¶ 2. Morton pressed her claim of discrimination with the Philadelphia Regional Office of the CSC, but was denied relief by letter of March 22, 1968. *See* Exh. G.

II.

Appellants brought this action in the District Court against the Secretaries of the Army and the Air Force and the Chairman and members of the Civil Service Commission, seeking declaratory and injunctive relief with respect to the future operation of the ART programs, and declaratory, injunctive, and monetary relief on behalf of Guttenberger, Meadows, Rolf, Minnich, and Morton. On cross-motions for summary judgment, the District Court ruled in favor of appellees.

Appellants' principal argument on appeal is that the ART programs are unlawful because they are not authorized by statute.[12] After examining the statutory framework governing the federal civil service, we are convinced, however, that the CSC and the Army and Air Force have acted within the scope of authority conferred by Congress.[13] As a threshold matter, it is clear that the

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[12] This is not the first case in which this court has considered the legality of operations under the ART program. In Rolles v. Civil Service Commission, 512 F.2d 1319 (D.C. Cir. 1975), we held that discharge of an Air Force ART employee from his civilian position, as a result of his transfer from active to inactive reserve status, without the opportunity to show that the transfer was not for reasons "within his control," was a violation of applicable Air Force and Civil Service regulations as well as due process of law. The statutory validity of the ART program as a whole was not in issue in that case, however.

[13] We therefore find it unnecessary to consider whether the executive branch possesses inherent constitutional powers, independent of those conferred by Congress, sufficient to support establishment of conditions of employment such as the reserve membership requirement. *See* Appellants' Reply Brief at 12-14.

Army and the Air Force have a statutory basis for employing civilian personnel. Under 5 U.S.C. § 3101, military departments are authorized to employ the number of civilian employees for which Congress provides appropriations.[14] However, appellants do not attack the civil service status of personnel serving support functions for the military reserves; rather, they question the existence of a statutory basis for imposing the reserve membership requirement as a condition of employment in such positions.

Under 5 U.S.C. § 3301, Congress has delegated broad authority to the President to establish the qualifications and conditions of employment for civil servants within the executive branch:

> The President may—
>
> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
>
> (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought;
>
> (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

5 U.S.C. § 3301 (1970). The President in turn has delegated much of this authority to the CSC through Executive Order No. 10577, 19 Fed. Reg. 7521 (November 22, 1954), which provides in relevant part:

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[14] 5 U.S.C. § 3101 (1970) provides in full:

> Each Executive agency, military department, and the government of the District of Columbia may employ such number of employees of the various classes recognized by Chapter 51 of this title [which deals with the classification of federal civil service positions] as Congress may appropriate for from year to year.

> *Sec. 1.2 Extent of the competitive service.* The competitive service shall include: (a) All civilian positions in the executive branch of the Government unless specifically excepted therefrom by or pursuant to statute or by the Civil Service Commission . . . . The Commission is authorized and directed to determine finally whether a position is in the competitive service.
>
> . . .
>
> *Sec. 2.1 Competitive examinations and eligible registers.* (a) . . . The Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations.

The validity of the reserve membership requirement must therefore be measured, first, against the terms of Executive Order 10577 and, second, for consistency with the statutory provision under which Executive Order 10577 was promulgated. *Cf. Jalil v. Hampton*, 460 F.2d 923, 927 (D.C. Cir.), *cert. denied*, 409 U.S. 887 (1972).

The CSC's agreements with the Army and the Air Force authorizing the ART programs, and the subsequent CSC manuals elaborating the qualifications and conditions of employment for those programs, clearly fall within Executive Order 10577's mandate to "establish standards with respect to . . . age, . . . , training and experience, suitability, and physical and mental fitness, and for . . . other requirements . . . ." The umbrella of authority created by 5 U.S.C. § 3301 extends, however, only to those standards of admission to the civil service which "best promote the efficiency of that service." In measuring the reserve membership requirement against this constraint, we must recognize the obvious intent of Congress to confer broad discretion upon the President and the CSC, and restrict ourselves to the limited scope

of judicial review which follows from this recognition. *See Gueory v. Hampton*, 510 F.2d 1222, 1225 (D.C. Cir. 1974); *Polcover v. Secretary of the Treasury*, 477 F.2d 1223, 1225-27 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973). So long as the CSC acted on the basis of considerations legitimately within its purview, we are compelled to uphold its judgment if supported by a rational basis. *See, e.g., Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 281-92 (1974).

The ART programs were approved by the CSC only after it was convinced that the combat readiness and effectiveness of the reserves would increase as a result. We cannot say that provision for a "hard core" of highly skilled reservists is an irrational means for achieving the goal of increased combat and mobilization efficiency. As the Director of CSC's Bureau of Inspections explained with respect to the Army ART program:

> Technicians are an integral part of the Army Reserve and they possess certain skills essential to the unit if it should be called to active duty. Since the transition from a Reserve status to active duty is critical, dual status personnel, who have been working for the unit and are familiar with unit administrative requirements are employed when the unit is mobilized to enable the critical functions to be performed effectively. When a substitute must replace a technician who does not accompany his unit, the function performed will suffer in some degree.

Letter of Feb. 13, 1969, Exh. C. Since the task of civilian support personnel obviously is to promote the effectiveness of reserve operations, a condition of employment which promises to enhance the reserves' ability to fulfill their combat mission is not unreasonable. We therefore agree with the Sixth Circuit's conclusion in *Baum v. Zuckert*, 342 F.2d 145 (6th Cir. 1965), that the reserve

membership requirement satisfies the statutory standard of promoting the efficiency of the civil service.[15]

Appellants maintain that Section 3301 does not constitute statutory authority for establishment of the reserve membership requirement because it does not *expressly* provide for imposition of military service as a condition of civilian employment. Moreover, appellants argue in passing that the ART programs violate the due process and equal protection guarantees embodied in the fifth amendment of the Constitution. While these arguments are not compelling in isolation,[16] appellants' due

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[15] The *Baum* case held that discharge of a preference eligible Air Force ART employee from his civilian position, following his reassignment from the active to the inactive reserves, satisfied the standard imposed by what is now 5 U.S.C. § 7512(a) which provides:

> An agency may take adverse action against a preference eligible employee, or debar him for future appointment, only for such cause as will *promote the efficiency of the service.*

5 U.S.C. § 7512(a) (1970) (emphasis supplied).

[16] Any claim based on equal protection or substantive due process would appear to be foreclosed by our finding that the ART program survives scrutiny under a "rational basis" standard. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Moreover, we would have thought it clear beyond peradventure that specific agency actions need not be expressly authorized in order to fall within the bounds of statutory authority. While it may be true, as appellants argue, that only Congress has the constitutional authority to require citizens to engage in military service, *see* Appellants Reply Brief at 2-11, we fail to see the logic of appellants' assertion that express statutory authority for the ART program is therefore required. So long as the defendants in this case have acted pursuant to authority properly delegated by Congress, it would seem that Congress's constitutional powers have not been infringed.

[Continued]

process claim—given the context of administrative action not expressly directed by statute—merits serious consideration in light of the Supreme Court's recent decision in *Hampton v. Mow Sun Wong*, 96 S.Ct. 1895 (1976), which was announced subsequent to oral argument in this case.

In *Mow Sun Wong* the Court, in an opinion by Justice Stevens, held that a Civil Service Commission regulation barring noncitizens from most positions in the federal competitive civil service deprived lawfully admitted resident aliens of liberty without due process of law. The regulation had been promulgated pursuant to the same executive order, Executive Order No. 10577, which forms the basis of the Commission's authority in the case at hand. The Commission advanced three rationales in support of the citizenship requirement: first, the broad exclusion of noncitizens might constitute a "bargaining chip" which would facilitate the President's negotiation of treaties with foreign powers; second, the regulation

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[16] [Continued]

Appellants argue that passage of the National Guard Technicians Act of 1968, 32 U.S.C. § 709 (1970), creating within the federal civil service a program in which civilian employees performing support functions for the National Guard may be required to maintain membership in the National Guard as a condition of employment, indicates the need for some statutory authority for the ART program other than 5 U.S.C. § 3301. This argument is wholly without merit. At the time the National Guard Technicians Act was passed, 95% of the Technicians were already required to be members of the National Guard, as a result of state regulations. *See* H.R. REP. No. 1823, 90th Cong., 2d Sess., at 4 (1968), 3 U.S.C.C.A.N. 3321 (1968). The primary purpose of the Act was to convert the National Guard technicians from a status of state employees paid out of federal funds, to federal civil servants, in order to provide them with uniform and adequate retirement and fringe benefit programs. *See* S. REP. No. 1446, 90th Cong., 2d Sess., at 1-2 (1968); H.R. REP. No. 1823, *supra* at 1-3, 3 U.S.C.C.A.N. at 3318-20.

created incentive for aliens to qualify for naturalization; and third, the need for undivided loyalty in certain sensitive positions justified a citizenship requirement in at least some parts of the civil service, and the broad exclusion avoided the administrative burden of identifying and classifying those sensitive positions. 96 S. Ct. at 1905-06. The Court assumed for the sake of argument that the first two rationales would be sufficient to justify the citizenship requirement if it were *expressly* imposed by Congress or the President, *id.* at 1906, 1910, 1911, but, after analyzing the framework of statutory provisions and executive orders, concluded that "the Commission may either retain or modify the citizenship requirement without further authorization from Congress or the President," *id.* at 1910, and thus the citizenship regulation was in no sense "*required*," *id.* at 1906, by any act of Congress or the President. The Court then found that the first two rationales advanced by CSC to support the regulation were not "properly the business of the Commission," *id.* at 1910-11; *see also id.* at 1906, and therefore could not properly be relied upon by CSC "in making a decision implicating the constitutional and social values at stake" in the case, *id.* at 1910. The Court did find, however, that the third rationale—the administrative desirability of a *per se* rule "when it is manifest that citizenship is an appropriate and legitimate requirement for some important and sensitive positions," *id.* at 1911—was within the scope of the only appropriate concern of the Commission, "the promotion of an efficient federal service," *id.* at 1911 & n. 47, *citing* 5 U.S.C. § 3301(1). But this rationale was nonetheless deemed inadequate as well, since the Commission had not made known the reasons for the regulation, there was no evidence that the Commission had made a considered evaluation of the relative desirability of the simple exclusionary rule and the alternative of a larger pool of eligi-

ble employees, the administrative burden of classifying sensitive positions did not appear to be particularly onerous, and the consequence of the regulation was the "wholesale deprivation of employment opportunities." *Id.* at 1911.

We think that *Mow Sun Wong* supports, rather than undermines, our conclusion that establishment of the ART programs was a proper exercise of the Commission's authority under Executive Order No. 10577 and 5 U.S.C. § 3301. The rationale for the ART programs—increasing the combat readiness and effectiveness of the reserves—is analogous to the interest in assuring the undivided loyalty of civil servants employed in sensitive positions: the reserve membership requirement, like the citizenship requirement with respect to sensitive positions, contributes to the fulfillment of the employing agency's mission. The considerations underlying the ART programs thus are clearly encompassed within the Supreme Court's conception of the "promotion of an efficient federal service." [17] Moreover, unlike the situation in *Mow Sun Wong*, the Civil Service Commission carefully considered the desirability of establishing the reserve membership requirement, clearly articulated the reasons for approval of the requirement, and tailored the program to carry out its underlying purpose without unduly infringing on the interests of employees affected by its im-

[17] We have no doubt that the statutory directive which merely requires such regulations "as will best promote the efficiency of [the] Service," as well as the pertinent Executive order, gives the Civil Service Commission the . . . discretion . . . [to] either retain or modify the citizenship requirement without further authorization from Congress or the President.

96 S. Ct. at 1910.

plementation.[18] The reserve membership requirement was limited to personnel serving support functions for the reserves; [19] and nonreservist incumbents were subject to reassignment, but not discharge.

III.

Appellants contend that, even if the Civil Service Commission otherwise would have the authority to impose the reserve membership requirement, it is foreclosed from doing so by statutory provisions which indicate a congressional intent to segregate the federal competitive civil service from the armed forces. In particular, appellants cite 5 U.S.C. §§ 2101, 2105(d) and a provision of

[18] The Court in *Mow Sun Wong* was careful not to foreclose reasonable classifications of civil service positions based on considerations properly within the scope of CSC's concern:

> . . . even though the argument of administrative convenience may not support a total exclusion, it would adequately support a rather broad classification of positions reflecting the considered judgment of an agency expert in personnel matters. For the classification itself would demonstrate that the Commission had at least considered the extent to which the imposition of the rule is consistent with its assigned mission.

Id. at 1911 n. 48.

We note also that the impact of the ART program falls most heavily upon nonreservists, a group which hardly could be described in the manner in which the Court characterized the resident aliens involved in *Mow Sun Wong*: ". . . an identifiable class of persons who, entirely apart from the rule itself, are already subject to disadvantages not shared by the remainder of the community." *Id.* at 1905. *See also id.* at 1905 n. 22, *citing In re* Griffiths, 413 U.S. 717, 721 (1973) (resident aliens a "discrete and insular" minority).

[19] Moreover, the 1961 agreement between the Air Force and CSC provided that "non-ART jobs will be established to the fullest extent within the ART organization to perform . . . non-ART work." Letter of June 6, 1961, *supra* note 5, ¶ 2.

the National Guard Technicians Act of 1968, 32 U.S.C. § 709(d).[20] Section 2101 sets out the definition of "civil service" for the purpose of Title 5:

> (1) The "civil service" consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States except positions in the uniformed services; . . . .

5 U.S.C. § 2101(1) (1970). "Uniformed services" is in turn defined by subsections (2) and (3) of section 2101 to include the Army and the Air Force. While this section clearly means that personnel serving in the Army and the Air Force are not *ipso facto* civil servants, it does not preclude civil servants from simultaneously maintaining membership in the armed forces.[21] Indeed, as the District Court noted, 387 F.Supp. at 71, ART employees are in a similar position in this respect to

[20] Appellants also cite 5 U.S.C. § 2105(c), which provides:

> An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of—
>
> (1) laws . . . administered by the Civil Service Commission; . . . .

5 U.S.C. § 2105(c) (Supp. V, 1975). However, as the District Court pointed out, 387 F. Supp. at 71, this provision is clearly inapplicable to the ART program, since ART personnel are not paid out of nonappropriated funds and are not employed by an instrumentality which fits the statutory description.

[21] Nothing in the rather limited legislative history of section 2101 suggests a conclusion to the contrary. *See* S. REP. No. 1380, 89th Cong., 2d Sess., at 46 (1966); H.R. REP. No. 901, 89th Cong., 1st Sess., at 26 (1965).

other civil servants who voluntarily maintain membership in the reserves.[22] It should be noted that the CSC has provided for separation of ART employees' civilian and military functions to the extent practicable. Army ART personnel are not required to wear uniforms or to observe the requirements of military courtesy except when functioning in their military capacity. *See* Memorandum of Understanding, July 5, 1960, Appellees' Brief at 31, ¶¶ 6-7. While serving in their civilian capacity, ART employees are governed by civil service laws and regulations.

Section 2105(d) also does not constitute a bar to establishment of the ART program. In full, the section provides:

> (d) A Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity.

5 U.S.C. § 2105(d) (1970). Appellants' reading of this provision is subject to the same logical flaw which undermined their reading of section 2101: while the section indicates that reserve members are not "employees" of the United States simply because of their reserve status, it does not prevent employees of the United States from becoming reserve members. The purpose of Section 2105

[22] Appellants attempt to blunt the force of this argument by suggesting that there is a difference between voluntary and "forced, involuntary" membership in the reserves. Appellants' Brief at 37. We concede that the Civil Service Commission must have some basis of authority for establishing reserve membership as a condition of employment, but we do not see the relevance of the voluntary-involuntary distinction for purposes of interpreting Section 2101.

(d) was simply to exempt reserve members who were not otherwise employed by the United States from statutory restrictions on activities of federal employees, *e.g.*, the Hatch Political Activity Act, *as amended*, 5 U.S.C. §§ 7324-25 (1970). *See* H.R. REP. No. 1884, 71st Cong., 2d Sess., at 2 (1930); S. REP. No. 1102, 71st Cong., 2d Sess., at 2 (1930).

Appellants cite the National Guard Technicians Act of 1968 for the proposition that it was unlawful to establish ART within the *competitive* civil service. The National Guard Technicians Act converted National Guard technicians—95% of whom were required by state regulations to maintain membership in the National Guard as a condition of employment—into federal civil servants, *see* note 16 *supra*, but in so doing placed these dual status personnel outside the competitive service.[23] Both the House and Senate Committee Reports explained the reason for the technicians' noncompetitive status as follows:

> The noncompetitive status is necessary for the technicians in view of (a) requirement for holding a concurrent military Guard status as a condition for employment and (b) the fact that civilian employment is terminated where the concurrent military status ceases to exist.

H.R. REP. No. 1823, 90th Cong., 2d Sess., at 6, 3 U.S.C. C.A.N. 3324 (1968); S. REP. No. 1446, 90th Cong., 2d Sess., at 5 (1968).

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[23] The Act provides in relevant part:

> A technician . . . is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required . . . to be a member of the National Guard.

32 U.S.C. § 709(d) (1970).

Notwithstanding some similarities between the National Guard Technicians program and the ART programs, we do not think it was unreasonable for CSC to include ART employees within the competitive service.[24] The job tenure of employees in the competitive service is protected by a variety of procedural and substantive

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[24] All civil service positions in the executive branch which are not subject to confirmation by the Senate are automatically part of the competitive service unless specifically excepted "by order or under statute." *See* 5 U.S.C. § 2102(a)(1) (1970). Under Executive Order No. 10577, described previously, the President has delegated limited authority to the CSC to determine whether positions should be placed outside the competitive service:

> *Sec. 1.2. Extent of the competitive service.*
>
> The competitive service shall include:
>
> (a) All civilian positions in the executive branch of the Government unless specifically excepted therefrom by or pursuant to statute or by the Civil Service Commission . . . under section 6.1 . . . .
>
> . . .
>
> *Sec. 6.1. Authority to except positions from the competitive service.* (a) The Commission is authorized to except positions from the competitive service *whenever it determines that appointments thereto through competitive examination are not practicable. Upon the recommendation of the agency concerned, it may also except positions which are of a confidential or policy-determining character.*

Executive Order No. 10577, 19 Fed. Reg. 7521 (November 22, 1954) (emphasis added). However, since appellants would not be benefitted by a transfer of ART employees from the competitive to the excepted service, we presume that the thrust of their argument is not that the CSC should have placed ART outside the competitive service, but rather that given the dual status of ART personnel it was unreasonable to place them within the competitive service. In light of our conclusion on the latter issue, it is unnecessary to decide whether or not the CSC would have the power to place ART personnel in the excepted service.

safeguards not accorded members of the excepted service. For example, the protections of the Lloyd-La Follette Act with regard to removal or suspension without pay apply only to employees in the competitive service:

> (a) An individual *in the competitive service* may be removed or suspended without pay only for such cause as will promote the efficiency of the service.
>
> (b) An individual *in the competitive service* whose removal or suspension without pay is sought is entitled to reasons in writing and to—
>
> (1) notice of the actions sought and of any charges preferred against him;
>
> (2) a copy of the charges;
>
> (3) a reasonable time for filing a written answer to the charges, with affidavits; and
>
> (4) a written decision on the answer at the earliest practicable date.
>
> Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for and the order of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and, on request, shall be furnished to the individual affected and to the Civil Service Commission.

5 U.S.C. §§ 7501 (a), (b) (1970) (emphasis supplied). These safeguards have been expanded upon by Civil Service Regulations which include provision for a right of appeal to the Civil Service Commission. *See* 5 C.F.R. §§ 752.201-.203 (1976).[25] The significance of the Lloyd-

[25] The only employees in the excepted service who are covered by these regulations are preference eligible employees who have completed one year of service. *See* 5 C.F.R. § 752-.201(a)(3) (1976).

La Follette Act for employees in the ART program was made abundantly clear by this court in *Rolles v. Civil Service Commission*, 512 F.2d 1319 (1975), which held that an ART employee could not be discharged from his civilian position because of his transfer from active to inactive reserve status, without an opportunity to show that the transfer was not for reasons "within his control."[26] At the same time, it is important to recall that an ART incumbent who loses active reserve status is subject to reassignment to the first available non-ART position at the same grade in the same geographical area. The military efficiency of the reserve unit is thus substantially preserved notwithstanding the protection afforded ART incumbents.

In passing the National Guard Technicians Act, Congress chose to give less job protection to National Guard technicians than the Civil Service and the Army and Air Force had granted to ART incumbents. State adjutant generals administering National Guard programs are directed to discharge from civilian employment any dual status technician who is separated from the National Guard, whether such separation was with or without cause. See 32 U.S.C. § 709(e)(1) (1970).[27] The statute

[26] The *Rolles* court found this result to be required by applicable Civil Service and Air Force regulations and, as an alternative holding, by due process of law.

Some of the other protections granted employees in the competitive service are summarized by 5 C.F.R. § 212.301 (1976), which provides in relevant part:

> An individual with competitive status may be, without open competitive examination, reinstated, transferred, promoted, reassigned, or demoted, subject to conditions prescribed be [sic] the Civil Service rules and regulations.

[27] In Tennessee v. Dunlap, 96 S. Ct. 2099 (1976), the Supreme Court confirmed this interpretation of § 709(e)(1) and, in contrast to *Rolles*, held that such a "chain reaction"

expressly provides that the right to appeal such an action does not extend beyond the adjutant general. *Id.* § 709(e)(5). Because Congress felt that the military needs of the National Guard outweighed the value of providing procedural and substantive safeguards for incumbents in the National Guard technician program does not mean, however, that it was an abuse of the CSC's discretion under Executive Order No. 10577 to provide such safeguards for ART technicians. Congress is of course free to except the ART program from the competitive service if it deems such action appropriate.

IV.

Appellants' final set of statutory arguments focuses on the application of the ART program to preference eligible veterans. See 5 U.S.C. § 2108 (1970). Appellants contend that the reserve membership requirement operates to deprive veterans of their rights under the Veterans' Preference Act of 1944 and, more particularly, 5 U.S.C. §§ 3312, 3351, 3363, 3504 (1970).[28] These provi-

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discharge was not a violation of due process since the property interest created by the National Guard Technicians Act did not extend beyond the guardsman's term of enlistment.

[28] Appellants also contend that ART violates veterans' retention preference rights under 5 U.S.C. § 3502, which provides in relevant part:

> (a) The Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to—
>
> (1) tenure of employment;
>
> (2) military preference, subject to section 3501(a)
>
> (3) of this title;
>
> (3) length of service; and
>
> (4) efficiency or performance ratings. . . .
>
> (b) A preference eligible employee whose efficiency or performance rating is "good" or "satisfactory" or better than "good" or "satisfactory" is entitled to be retained in preference to other competing employees. A preference eligible employee whose efficiency or performance rating is below "good" or "satisfactory" is entitled to be retained in preference to competing nonpreference employees who have equal or lower efficiency or performance ratings.

However, this provision by its terms applies only to "competing" employees; since ART employees occupy a separate competitive level from non-ART employees, the provision does not grant veterans in the latter category a preference over employees in the former category. *See, e.g.*, Elder v. Brannan, 341 U.S. 277, 283-85 (1951); Hilton v. Forrestal, 165 F.2d 251 (D.C. Cir. 1947), *aff'd sub nom.* Hilton v. Sullivan, 334 U.S. 323 (1948); Novogroski v. United States, 153 F. Supp. 421, 427 (Ct. Cl. 1957). Moreover, for the reasons discussed previously with regard to establishment of reserve membership as a condition of employment, *see* part II *supra*, the CSC had a reasonable basis for making reserve membership a ground for separate competitive levels.

Appellants cite a section of the National Guard Technicians Act of 1968—32 U.S.C. § 709(f) (1970), which makes 5 U.S.C. §§ 2108, 3502, 7511, and 7512 inapplicable to the National Guard technicians program—for the proposition that the protections of the Veterans' Preference Act cannot be abrogated except through specific action by Congress, and that as a result ART must be conducted in compliance with the Act. We could not agree more. As discussed in this footnote and in text below, the ART programs *are* being conducted so as to carry out the provisions of the Act. In this regard, it should be noted that merely because § 3502 is of no aid to preference eligible non-ART employees who wish to "bump" ART personnel, this does not mean that the Veterans' Preference Act has no application to ART employees or, for that matter, to non-ART employees. In addition to the safeguards accorded preference eligible ART and non-ART employees by Sections 7511 and 7512 of Title 5, both groups of employees are protected by § 3502 as against non-preference eligibles of the same competitive level *within their respective groups.*

sions instruct the Civil Service Commission, in determining the qualifications of a preference eligible individual for examination, appointment, or reinstatement (§ 3312), for transfer (§ 3351), for promotion (§ 3363), and for retention (§ 3504), respectively, to waive

> (1) requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position; and
>
> (2) physical requirements if, in the opinion of the Commission or other examining agency, after considering the recommendation of an accredited physician, the preference eligible is physically able to perform efficiently the duties of the position.

5 U.S.C. §§ 3312, 3351, 3363, 3504 (1970). The claim of appellant Rolf, a non-ART employee who was subjected to a reduction-in-force and was refused transfer into an ART position because he failed to meet the physical requirements for reserve membership, is representative of the potential conflict between ART and § 3351; the claim of appellant Minnich, who was refused promotion within ART because he failed to satisfy the reserves' age requirement, exemplifies the potential conflict between ART and § 3363.

Before the District Court, the CSC conceded that to meet the statutory provisions a showing had to be made that satisfaction of the reserves' age and physical requirements was necessary for the efficient performance of ART incumbents' duties, but asserted that the required showing was made out by the following syllogism: reserve membership is a condition of employment which is essential to the performance of a reserve technician's duties; satisfaction of the reserves' age and physical requirements is necessary in order to gain reserve membership; therefore, satisfaction of the age and physical requirements is necessary in order to perform the duties

of the technician position in a satisfactory manner. *See* 387 F. Supp. at 74-75. The District Court saw a potential discrepancy between the statute's focus on the ability to perform the *duties* of the position and the Commission's emphasis on the importance of reserve membership as a *condition of employment*, but ultimately deferred to the Commission's interpretation of the Act. *See id.* at 75.

Finding the syllogism drawn by CSC convincing, and the distinction between duties and conditions of employment largely illusory in this context, we conclude that the ART program does not violate 5 U.S.C. §§ 3312, 3351, 3363, 3504. Whether continued membership in the reserves is called a duty or a condition of employment, the fact remains that the purpose of the ART program would be undermined if individuals who failed to gain admission to the reserves were freely hired into the program.[29] The District Court's analogy of the reserve membership requirement to the requirement that employees in some civil service positions be members of the bar, *see* 387 F. Supp. at 71, carries special force here: were a state bar association to impose certain prerequisites for admission to the bar, the CSC would have little choice but to defer to the association's judgment. If appellants feel that the age and physical requirements for admission to the reserves are irrational or otherwise in violation of the law, the proper recourse is to bring suit directly chal-

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[29] At the same time, we do not think that the protection granted to nonreservist incumbents in positions taken over by ART, to nonreservists who are hired when no reserve members are available, and to ART incumbents who involuntarily lose their active reserve status, undermines the rationality of the ART program. Although these individuals cannot be discharged for failure to meet the reserve membership requirement, they are subject to reassignment to the first available non-ART job of the same grade in the same geographical area.

lenging those requirements. For the purposes of this appeal, we must assume that the age and physical standards are rationally related to the reserves' combat mission; as such, there is little doubt that the standards contribute to the effective performance of an important duty of ART employees—maintaining themselves in a position to increase the combat readiness and effectiveness of reserve units.

V.

Appellants attempt to buttress their claim under the Veterans' Preference Act by noting that the original agreements between the CSC and the Army and Air Force contained provisos promising that the ART programs would be conducted in strict compliance with the Veterans' Preference Act. Given our conclusion that ART does not violate the Act, it of course follows that the agreements have not been violated in this regard either.[30] However, at several points in their brief, appellants assert a broader inconsistency between the initial agreements and subsequent practice under the ART programs: appellants claim that CSC, the Army, and the Air Force abandoned the terms of the initial agreements and pursued a course designed to eliminate non-ART employees while retaining ART employees; more particularly, they contend that the reduction-in-force procedures followed with respect to the Air Force ART pro-

[30] The provisos would be difficult to explain if the Veterans' Preference Act provided no protection for ART and non-ART incumbents. However, as explained previously, *see* note 28 *supra*, the portions of the Act codified in 5 U.S.C. §§ 7511 and 7512 inure to the benefit of preference eligible employees both within and outside the ART program, and the retention preference rights granted by 5 U.S.C. § 3502 are fully applicable as against non-preference eligibles within the same competitive level.

gram,[31] and the establishment of separate competitive levels for ART and non-ART employees in both the Army and the Air Force, fail to satisfy the armed forces' initial promises that "safeguards" would be adopted to protect incumbent Civil Service employees affected by the ART plans.

Inconsistent agency action without adequate explanation would, of course, be cause for reversal. As Judge Leventhal stated in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971),

> An agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.

See also, e.g., Atchison, T. & S.F. R. Co. v. Wichita Board of Trade, 412 U.S. 800, 808 (1973); *International Union, UAW v. NLRB*, 459 F.2d 1329, 1341 (D.C. Cir. 1972). We have examined the record with great care and, having found that subsequent CSC, Army, and Air Force statements of policy are not facially inconsistent with the initial agreements, and that all of the individual appellants either were treated in a manner consistent with the agreements or are not in a position to bring their claims before this court, we see no cause for reversing the District Court's judgment in favor of appellees.

[31] Appellants' brief characterizes the 1961 agreement between the Air Force and CSC regarding the assumption of non-ART work by ART organizations, incorporated into FPM Supp. (Internal) 930-71, *see* note 11 *supra*, as being fully applicable to the Army ART program as well. We have been unable, however, to find any indication in the record that the Army and CSC entered into an agreement similar to the 1961 agreement with the Air Force.

Any claim of inconsistency with respect to promotion policies can easily be answered. While guaranteeing that nonreservist incumbents in positions taken over by ART, and nonreservists hired when reserve members were unavailable, would not be removed or discharged because they lacked reserve status, neither the 1960 Memorandum of Understanding between the Army and CSC nor CSC Letter No. 57-45 explaining the terms of the 1957 agreement between the Air Force and CSC indicates that nonreservist incumbents would be considered for promotion within the ART program on an equal basis with individuals who satisfied the reserve membership requirement. To the contrary, both documents indicated that nonreservist incumbents would be subject to reassignment to equivalent non-ART positions, and CSC Letter No. 57-45 specifically stated that job openings would be filled by persons eligible for and willing to accept active membership in the reserves.[32] FPM Supp. (Internal) 930-71 and 930-72, as well as Army Reg. 140-315, continued this policy of giving qualified reserve members priority over nonreservist incumbents attempting to gain promotions within the ART program. The refusal to promote Minnich and Morton was a straightforward application of this policy.

Establishment of separate competitive levels for ART and non-ART positions was also fully consistent with the 1960 Memorandum of Understanding and CSC Letter No. 57-45. CSC Letter No. 57-45 stated that there would be no reductions-in-force for the purpose of effectuating the ART program, *see* p. 4 *supra*, but did not promise that individuals employed in non-ART positions at the time of ART's creation would be granted retreat

[32] This is not surprising since allowing nonreservists full promotion rights would have undercut the purpose of the ART program to place dual status personnel in important support positions.

rights to ART positions in the event of a reduction-in-force not related to the effectuation of ART. Indeed, the letter stressed that reserve membership was to be a condition of employment for the ART program. Allowing nonreservists subjected to a reduction-in-force to transfer into the ART program would of course have hindered achievement of the goal of increased combat readiness.

Appellants' allegation of an inconsistency between CSC Letter No. 57-45 and the reduction-in-force procedures subsequently adopted for the Air Force ART program is somewhat more troublesome. Some of the language in the 1961 agreement between the Air Force and CSC regarding the assumption of non-ART work by ART organizations appears to be in potential conflict with the pledge in CSC Letter No. 57-45 that there would be no reductions-in-force for the purpose of effectuating ART. In particular, ¶ 1 of the 1961 agreement provides:

> The Air Force may conduct whatever future reductions may be necessary to bring the non-ART activity down to the level which will continue after consolidation. In these reductions the separate competitive level concept will be followed. The Air Force may anticipate in these reductions the eventual numbers, types, and grades of employees it will need to conduct the remaining non-ART functions after the consolidations.

Letter of June 6, 1961, *supra*. This potential conflict appears to be remedied, however, by ¶ 4 of the agreement, which provides in relevant part:

> Reductions in ART and non-ART positions will be generally proportionate to the reductions in ART and non-ART work which occasioned the personnel reductions. If no specific reduction in work is involved, and the curtailment in numbers of positions results from a general "belt-tightening" or across-the-board type of reduction and reorganization, the

> reduction in ART and non-ART positions will be generally proportionate. Action will be taken to assure that reductions of this type are not organized so as to discriminate against non-ART and status quo personnel.

Id.[33] So long as a conversion of non-ART positions to ART positions is not considered to be a reduction in non-ART work, ¶ 4 would appear to carry out CSC Letter No. 57-45's pledge. And, so long as ¶ 4 is read as a constraint on the Air Force's authority under ¶ 1 to order reductions in non-ART personnel, the agreement as a whole is not inconsistent with Letter No. 57-45.

Although the 1961 agreement is not a model of clarity, we cannot say that it is inconsistent on its face with prior statements of policy. Until we are presented with instances in which the agreement has been applied by the Air Force in a manner inconsistent with the safeguards promised by CSC Letter No. 57-45, we must presume that the Air Force and the CSC have adopted a consistent line of action.

Regardless of the merits of the general claim that the 1961 agreement is inconsistent with CSC Letter No. 57-45, it is clear that individual appellants Guttenberger, Meadows, and Rolf may not gain relief based on that theory. Although there is ample evidence in the record that the reduction-in-force affecting Guttenberger and Meadows resulted from fund limitations rather than an

[33] ¶ 3 of the agreement also was sensitive to the need to protect non-ART incumbents from unfair discrimination: where ART employees were spending a substantial portion of their time doing non-ART work, ART and non-ART employees would be considered to be in the same competitive level. *See* note 6 *supra*. However, being allowed to retreat to an ART position in the event of a reduction-in-force is not sufficient in and of itself to satisfy CSC Letter No. 57-45's pledge that there would *be* no reductions-in-force to effectuate ART.

absorption of their duties by the ART program, *see* Appellees' Brief at 33, 36; AF Exh. 1, at 10, 16, 18; AF Exh. 2, at 11, 17, 19, we agree with the District Court's conclusion, 387 F.Supp. at 69, that their claims must be denied for failure to exhaust administrative remedies. *See, e.g., McKart v. United States*, 395 U.S. 185, 193-95 (1969); *Hall v. United States Civil Service Commission*, 533 F.2d 695 (D.C. Cir. 1976); *Young v. Higley*, 220 F.2d 487 (D.C. Cir. 1955). Guttenberger and Meadows were informed of their right to appeal the adverse decisions of the Regional Office to the CSC Board of Appeals and Review, *see* 5 C.F.R. §§ 752.203, 772.310 (1976), but failed to take advantage of the opportunity. Under these circumstances, where the claim involves potential inconsistency in the agency's actions, it is particularly important—in terms of respect for the agency's decision-making processes and aid to the court in framing the issues, as well as to promote judicial economy—for the agency "to be given a chance to discover and correct its own errors." *McKart v. United States, supra* at 195.

Unlike Guttenberger and Meadows, appellant Rolf did exhaust his administrative remedies by unsuccessfully appealing to the Board of Appeals and Review. However, since there is substantial evidence in the record that the reduction-in-force which affected Rolf was not made for the purpose of effectuating the ART program, we see no inconsistency with CSC Letter No. 57-45, and as a result Rolf's claim for relief must also be denied. *See, e.g., Polcover v. Secretary of the Treasury*, 477 F.2d 1223, 1225-26 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973). The decision of the Philadelphia Regional Office in Rolf's case states that the reduction-in-force resulted from elimination of the non-ART function of conducting combat readiness training, a function which assertedly was unrelated to the reserve mission of Rolf's installation. *See* Letter of April 22, 1969, Appellees' Brief at

38-40. Moreover, internal Air Force communications reproduced in the record indicate that the reduction-in-force resulted from manpower and budgetary restrictions and that the non-ART personnel were not forced to bear more than a proportionate share of the reduction. Of 483 positions included in the reduction, 408 were ART positions and 75 were non-ART positions. *See* AF Attch. 39.

The judgment of the District Court is therefore

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

No. 75-1091

Civil Action 74-70

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL.,
Appellants

v.

MARTIN R. HOFFMANN, Secretary of the Army, ET AL.

Before: WRIGHT, McGOWAN and TAMM, *Circuit Judges.*

Order

(Filed October 8, 1976)

On consideration of the petition for rehearing filed by appellants American Federation of Government Employees, et al., it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

No. 75-1091

Civil Action 74-70

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., *Appellants*

v.

MARTIN R. HOFFMANN, Secretary of the Army, ET AL.

Before: BAZELON, *Chief Judge;* WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges.*

Order

(Filed October 8, 1976)

The suggestion of appellants American Federation of Government Employees, et al. having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

No. 76-905

Supreme Court, U. S.
FILED
MAR 29 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., PETITIONERS

v.

SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

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v.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 543 F. 2d 930. The opinion of the district court (App., *infra*, pp. 1a-25a) is reported at 387 F. Supp. 63.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1976. A timely petition for rehearing

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[1]Petitioners have neglected to reproduce the district court's opinion in their petition. See Rule 23(1)(i) of the Rules of this Court. For the convenience of the Court, we have reprinted that opinion as an appendix to this brief.

was denied on October 8, 1976 (Pet. App. 39a). The petition for a writ of certiorari was filed on December 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether certain technicians who provide support services for the Air Force and Army Reserves properly may be required, as a condition of employment, to maintain active membership in the reserve unit that they are serving.

STATEMENT

Petitioners commenced this action in the United States District Court for the District of Columbia to challenge the Reserve Technician Programs of the Army and Air Force on both constitutional and statutory grounds. Under the Reserve Technician Programs, certain technicians serving as support personnel for reserve units must maintain membership in the military reserves as a condition of employment. Because of this membership in the reserves, the technicians are subject to call to active duty in case of emergency.

The Reserve Technician Programs were designed to increase the mobilization readiness of reserve military units. As the court of appeals described the program (Pet. App. 3a-4a):

> In a letter dated June 25, 1957, the Civil Service Commission (CSC) authorized the Air Force to proceed with its Air Reserve Technician plan (hereinafter ART).[1] The primary goal of the plan was to increase the combat readiness of Air Force Reserve units, as well as their effectiveness in the event of mobilization. Prior to ART, the Air Reserve Flying Centers utilized for training Air Reserve Wings were

maintained and operated by Air Force units which were composed of approximately half military and half civilian personnel and were organizationally separate from the reserve wings. ART, by replacing military support personnel with civil servants[2] and requiring civilian support personnel to be active reserve members, in effect integrated the support organizations into the Air Reserve Wings. In their civilian capacity, ART incumbents were to provide the basic maintenance and supply functions previously provided by the support organization; in their military capacity, ART employees were to provide training for the remainder of the wing personnel, who reported only on weekends and during summer active duty tours.[3] Since this "hard core" of highly skilled reservists would be available for immediate mobilization, the Air Force anticipated that combat readiness would be enhanced.[4]

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[1]For purposes of most issues raised in this case, the Air Force and Army Reserve Technician programs are equivalent and will be lectively referred to as "ART." Where greater specificity is required, the Air Force and Army programs will be identified accordingly.

[2]Military support personnel were transferred to regular Air Force units.

[3]ART incumbents receive the regular pay for their civilian jobs, plus military pay for their weekend and summer active duty tours.

[4]It was anticipated that approximately 20% of each reserve wing would be composed of ART personnel.

The requirement that civil service employees maintain membership in the reserves was proposed by the

Army and Air Force. The Civil Service Commission approved the plan on condition that it comply with the Veterans' Preference Act of 1944 and that no civil service employees then serving would be adversely affected (Pet. App. 4a-6a). Employees holding positions to be included in the Reserve Technician Programs were given an opportunity to join the reserves and, if they declined or were not eligible to do so, were reassigned at no loss in pay to other jobs.

The district court concluded that the requirement of membership in the reserves does not conflict with any of the provisions of the civil service laws, and it entered summary judgment for respondents (App., *infra*, pp. 24a-25a). The court of appeals affirmed. It concluded that the Reserve Technician Programs were a rational strategy to provide the reserves with a " 'hard core' of highly skilled reservists" (Pet. App. 16a) available for duty, with the reserve units, in case of emergency. It considered and rejected all of the arguments petitioners make here.

ARGUMENT

Petitioners apparently concede that the Army and Air Force could require all technicians for reserve units to be members of the uniformed services. They also apparently concede that the Army and Air Force could establish programs under which some technicians were uniformed military personnel and others were civilian civil service personnel. But, they contend, once the Army and Air Force decided to allow civilians to be employed as reserve unit technicians, they were precluded by the Constitution and by statutes from requiring those civilians to assume, as a condition of employment, any obligation to accompany their reserve units in time of emergency. This position is unsound. There is no conflict among the

circuits on the issues presented here[2] and no reason for review by this Court.

Petitioners first contend (Pet. 14-17) that the Reserve Technician Programs intrude upon Congress' exclusive power to raise and support armies. The court of appeals correctly held, however, that Congress had provided the Army and the Air Force with ample authority to determine which reserve employees shall be uniformed military personnel, which shall be civilians with reserve obligations, and which shall be civilians without such obligations (see Pet. App. 13a-21a). The Civil Service Commission, in approving the program proposed by the armed services, also acted within its statutory authority. 5 U.S.C. 3301 provides the President with broad authority to establish the qualifications and duties of civil servants; 5 U.S.C. 3101 authorizes military departments to employ civil servants for duties selected by the armed services; these powers are exercised in part by the Civil Service Commission under Executive Order 10577, 19 Fed. Reg. 7521, which authorizes the Commission to determine which civil service positions are in the competitive service, and what the qualifications for these positions shall be.

The requirement that reserve technicians be members of the reserves falls within the delegated authority of the Commission to define job eligibility requirements that will "best promote the efficiency of the service" (5 U.S.C. 3301).[3] The program was designed to increase

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[2]The Reserve Technician Programs were upheld in *Baum* v. *Zuckert*, 342 F. 2d 145 (C.A. 6), the only other appellate decision to consider them.

[3]Petitioners' argument (Pet. 19-20) that the Commission cannot change the standards governing the employment of personnel who

the military readiness of the reserves. As the court of appeals explained, since "the task of civilian support personnel obviously is to promote the effectiveness of reserve operations, a condition of employment which promises to enhance the reserves' ability to fulfill their combat mission is not unreasonable" and "satisfies the statutory requirement of promoting the efficiency of the civil service" (Pet. App. 16a-17a).[4]

The Reserve Technician Programs do not conflict with any statute. The establishment of separate statutory schemes for the employment of civilian and military personnel (5 U.S.C. 2101 and 2105(d)) does not mean that civil service employees cannot, under any circumstances, have obligations to the armed forces. Under the Reserve Technician Programs, civil service employees control the civilian aspects of the employment; military standards apply only to the reserve obligations. Nothing in the statutes prevents civil service employees from joining the reserves. See Pet. App. 21a-24a.

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have been hired before the date of the change is frivolous. If petitioners were correct, it would be illegal to change the duties of any federal employee, regardless of changes in the skills or qualifications needed for the job. Petitioners cite no authority for their position, and we know of none. See Pet. App. 32a-38a.

[4]Because the Reserve Technician Programs promote the efficiency of the service and are directly related to the purposes for which the technicians are employed, *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, upon which petitioners rely (Pet. 23-26), is inapposite. The court of appeals thoroughly considered *Mow Sun Wong* (Pet. App. 18a-21a) and concluded that the Court's analysis there supports, rather than undermines, the propriety of the programs at issue here. Nonreservists, unlike the aliens excluded from federal civil service jobs in *Mow Sun Wong*, are not a discrete and insular minority. Unlike the requirement of citizenship, the requirement of membership in the reserves is precisely tailored to the jobs for which such membership is a pertinent qualification for employment, and it is the product of thorough consideration by those charged with maintaining the readiness of the reserves.

Petitioners' argument (Pet. 21-23) that the Reserve Technician Programs is inconsistent with the National Guard Technicians Act, 32 U.S.C. 709, is insubstantial. The National Guard Technicians Act, which this Court discussed and upheld against a constitutional challenge in *Tennessee* v. *Dunlap*, 426 U.S. 312, provides that civilian technicians employed by the National Guard must be members of the National Guard, and that any technician separated from the Guard for any reason (including expiration of his term of enlistment) must be separated from from his employment as a technician. The National Guard Technicians Act, far from being inconsistent with the Reserve Technician Programs, demonstrates that Congress endorses (and in some circumstances mandates) the requirement that technicians providing support services for reserve units also have an obligation to serve under military discipline if, during an emergency, their units are called into active duty.

Although National Guard technicians are not afforded the protections of the federal civil service, nothing in the text or legislative history of the National Guard Technicians Act indicates that Congress thought that a requirement of membership in the reserves would be inconsistent with civil service employment. The fact that technicians hold civil service status means that, if they do not maintain membership in the reserves, they will receive, in accordance with standard procedures, an offer of other available civil service employment not subject to the reserve requirement. The reserve technicians therefore are in a more advantageous position than the National Guard technicians, who are released outright when their membership in the National Guard terminates. This difference does not make the membership requirement less appropriate for civil service employees; to the contrary, the existence of civil service tenure protects the

civil servant against complete loss of employment and therefore makes less burdensome the requirement of membership in the reserves.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

DOJ-1977-03

APPENDIX

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES,
et al., Plaintiffs,

v.

STANLEY R. RESOR, Secretary of the Army, et al.,
Defendants.

Civ. A. No. 74-70

United States District Court,
District of Columbia.

Nov. 21, 1974.

MEMORANDUM OPINION

WADDY, District Judge.

This action, arising under the federal civil service laws, is before the Court on defendants' motion for summary judgment and plaintiffs' cross-motion for summary judgment. Plaintiffs are five civilian employees of the Department of the Army and the Department of the Air Force[1] and the American Federation of Government Employees (AFGE), a labor organization representing federal civil servants. Plaintiff AFGE is recognized by both the Army and Air Force as the exclusive bargaining agent for civilian employees in units in which collective bargaining agreements have been executed. Defendants are the Secretaries of the Army and Air Force and the

[1] Although the plaintiffs alleged in their complaint that this action is brought on their own behalf and on behalf of a class of civil service employees, a petition to certify as a class action has not been filed. Accordingly, the Court does not treat this as a class action and the discussion which follows is limited to the facts presented and relief claimed by the named plaintiffs.

Commissioners of the Civil Service Commission. Plaintiffs claims, briefly stated, involve the legality of the Army's and Air Force's Reserve Technician Programs (hereinafter referred to as ART), which require as a condition of employment that personnel in the programs maintain membership in the Army and Air Force Reserves. It is alleged that the reserve membership requirement violates various provisions of the civil service laws and that the agreements between the Civil Service Commission and the Army and Air Force establishing the ART programs are unlawfully vague. Plaintiffs ask the Court to declare illegal and to enjoin the operation of the ART programs. In addition, the individual plaintiffs seek injunctive and monetary relief with respect to administrative actions taken against them.

FACTS

I.

The material facts in this case, as set forth below, are undisputed. There being no genuine issue as to any material fact, summary judgment may be entered pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The Civil Service Commission (CSC), on June 25, 1957, informed the Department of the Air Force that it was approving the Department's proposed ART program, under which specified technical positions in the career civil service would be filled only by persons who became and remained members of the active Air Force reserve.[2] Applicants would be required to compete for these

[2]Letter from Harris Ellsworth, Chairman, Civil Service Commission, to David F. Smith, Assistant Secretary of the Air Force, June 25, 1957.

positions through competitive examinations, as is true for other positions in the competitive service.[3] Incumbents would receive the regular pay of their civilian jobs, plus military pay for the time spent in military status (e.g., weekend reserve duties). A memorandum issued by the CSC shortly after its initial notification to the Air Force outlined the operation of the new plan and noted that it was designed "to increase mobilization readiness of Air Reserve flying units."[4]

Prior to the initiation of the ART program an Air Force Base consisted of two separate organizational units: "Flying Centers" and "Reserve Wings." The latter are combat organizations comprised of active reservists who receive periodic military training. The Flying Center, on the other hand, is made up of both military and civilian personnel engaged primarily in maintaining and operating the Base's facilities. As a result of the inauguration of the ART program the following changes were brought about:

> Under the Air Reserve Technician Plan, the Air Reserve Flying Centers and the Reserve Wings will be integrated organizationally to provide within each Wing a permanent cadre or "hard core" or highly skilled personnel available for immediate mobilization. This hard core will consist of civilian reservists who in their civilian capacity will provide the basic functions of maintenance, supply, etc., heretofore provided by Air Force Center personnel, and in addition in their military capacity will provide training for the remainder of the wing personnel who will continue to report only on weekends and during summer active duty tours. The hard

[3]See 5 U.S.C. § 2102.

[4]Civil Service Commission Letter No. 57-45, June 28, 1957.

core will constitute on an average approximately 20% of the strength of each flying wing.

. . . . . .

The Air Force will assign to all ART positions comparable military designations and ranks. It is important to recognize that the civilian job and the military assignment are the same. This program includes the establishment as civilian positions of many combat type jobs that heretofore have always been held by active duty uniformed personnel, including such jobs as wing commanders.[5]

This merger of military and civilian functions at the Air Bases was further explained in a Continental Air Command "Personnel Policy and Procedures Manual" issued on April 7, 1958:

At present an Air Reserve flying center is the responsibility of and operated by an Air Force organization which is apart and separate from the Air Reserve flying unit being trained at the location. This organization is composed of approximately half military and half civilian personnel. Its primary mission is to maintain equipment and operate an Air Force facility to be used by an Air Reserve flying unit in accomplishing its training. To the extent possible, it does assist in the training of Reserve personnel through the responsibility for this training is properly that of the Air Reserve flying unit. On the other hand, there is the Air Reserve flying unit which utilizes the facility and equipment in providing for inactive duty

[5] *Id.* at 2, 4.

training on the equivalent of one weekend per month and for one two-week period of active duty per year. Other than occupying and utilizing the same facility there is, at present, no direct connection or relationship between these two organizations. The ART Plan provides generally for a consolidation of these two units through integrating that portion of the permanent party support requirement, which is directly related to the tactical portion of the Air Reserve flying unit, into the Reserve unit utilizing that facility. The majority of the positions thus integrated will be designated as ART and will be identified with an identical or comparable position in the Air Reserve flying unit.[6]

A CSC manual entitled "Recruitment of Air Reserve Technicians Through Competitive Examination" informed civil service examiners of the nature of the ART program, instructing them that the reserve technicians were to enjoy all benefits accruing to other employees in the competitive civil service.[7] However, the ART positions were clearly defined to comprise a separate competitive level[8] because of the reserve membership requirement. Although the manual advised that any future budget reductions would proportionately affect ART and non-ART personnel, the latter employees could not transfer

[6] CONACM 40—1 at 4, April 7, 1958.

[7] CSC FPM Supp. 930—71, August, 1966 (replacing Handbook X-151). The manual noted that the duties of certain civilian positions, such as operations and training officers, would include the briefing of combat crews and the training of reserve members. CSC FPM Supp. 930—71, August, 1966.

[8] See 5 C.F.R. § 351.403.

into an ART position, in the event of a RIF, unless able and willing to meet the reserve requirements.[9]

On July 5, 1960 the Chairman of the CSC advised the Department of Defense that the proposed Army Reserve Technician program was approved pursuant to an eight-point Memorandum of Understanding, with the following proviso:

> This approval is based on our understanding that the Department of Army is in full agreement with the provisions of the enclosed Memorandum of Understanding, and will carry out both in letter and spirit the commitments it has made and the safeguards it has promised to apply with respect to employees who would be affected by the plan. It is also understood that the department of Army will comply fully and strictly with the requirements of the Veterans' Preference Act of 1944 and the Commission's regulations under that act in all of its activities under the plan..[10]

In November, 1960 the CSC issued a manual entitled "Recruitment of Army Reserve Technicians Through Competitive Examination"[11] which was similar to its Air Force counterpart. The manual incorporated the terms of the Memorandum of Understanding, including the condition that "[t]he lack or involuntary loss of military

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[9]The manual also discussed the possible overlap of ART and non-ART functions, in spite of the maintenance of distinct competitve levels. It was advised, however, that no more than 30% of an ART employee's responsibilities should be devoted to non-ART duties. FPM Supp. 930—71, Appendix at A—4.

[10]Letter from Roger W. Jones, Chairman, Civil Service Commission, to Charles C. Finucane, Assistant Secretary of Defense, July 5, 1960.

[11]CSC FPM Supp. 930—72, August, 1960.

status will not be a basis for removing present or future civilian employees."[12] However, the Army program, as the Air Force's, devised separate competitive levels for ART and non-ART employees,[13] the distinguishing criterion being the reserve membership requirement.[14]

II.

On January 7, 1969 plaintiff Erwin P. Rolf, a preference eligible employee[15] of the Air Force, received notice of a RIF action, as a result of which he was reduced in grade and transferred from a position as flightline mechanic to warehouseman. Rolf was denied transfer into an ART position because he could not satisfy the reserve membership requirements. He subsequently appealed the RIF action, arguing that the conditions of entrance into the ART program violated his rights as a preference eligible employee, including his retention rights.[16] The appeal was denied by both the Philadelphia Regional Office of CSC and the Board of Appeals and Review (BAR).[17]

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[12]Memorandum of Understanding Para. 2.

[13]The manual provided that ART positions could also be filled on a non-competitive basis. FPM Supp. 930—72 at 3.

[14]The duties of the ART employees were identified as "preparation and maintenance of personnel records and files, payrolls for the members of the unit, military correspondence, instruction in Army regulations and procedures, interview and personnel processing of new members of the unit, screening of qualifications, placement and assignment of duties, determining retirement points, and personnel and administrative guidance to members of the reserve units." *Id.*, Appendix C at C—1.

[15]See 5 U.S.C. § 2108.

[16]See 5 U.S.C. §§ 3312, 3351, 3502, 3504.

[17]Decision dated August 7, 1969.

Plaintiffs Guttenberger and Meadows, preference eligible civil servants at McGuire Air Force Base, received general notices of a RIF action on May 6, 1969. Neither of these plaintiffs was a member of the active reserves at the time of the RIF. Offers of reassignment to lower grade positions at McGuire were extended to both employees. Guttenberger accepted the reassignment while Meadows declined the offer.[18] Appeals of the RIF actions were taken by both of these plaintiffs to CSC's New York Regional Office, arguing that the duties of these employees' positions were being continued after the RIF and that the jobs were being performed by Reserve personnel in lower retention status.

The New York Regional Director advised Guttenberger and Meadows, on August 14, 1969, of the rejection of their appeal. The letters, identical in content, stated that the RIF actions were necessitated by fund limitations and were not the result of the reorganization of the Base following initiation of the ART program. As to the argument that these plaintiffs had priority over reserve members with lesser retention rights, the letter reiterated the position that ART employees are in a competitive level distinct from the levels occupied by non-ART personnel. The letter further stated:

> The duties formerly performed by you are not being peformed by the Air Reserve Technicians but are being performed by other civilian employees or military personnel. It should be noted that the Air Force Reserve Technician personnel perform a separate function and exist solely for the purpose of

[18] Meadows later accepted reinstatement to a different position, effective September 2, 1969.

> training reservists during training weekends and active duty encampment.[19]

Neither Guttenberger nor Meadows appealed the decisions to the CSC Board of Appeals and Review.

Plaintiffs Morton and Minnich were employed by the Army at the Indiantown Gap Military Reservation, Annville, Pennsylvania at the time of the Department's ART reorganization. Pursuant to the provisions in the agreement between the CSC and the Army, these employees were reassigned to positions within the ART program, in spite of the fact that neither was a member of the reserves.[20] When Morton and Minnich later requested assignment to higher grade positions within the ART program, they both were informed that the transfers would be approved pending satisfaction of the requirements for membership in the reserves. However, Ms. Morton failed to meet the physical requirements for reserve membership, while Mr. Minnich was denied transfer from the retired to the active reserves because of his age. As a result of their failure to satisfy the reserve requirement, plaintiffs Morton and Minnich were informed that their transfers would not be approved.[21]

[19] See letter from Robert J. Drummond, CSC Regional Director, to John S. Guttenberger, August 14, 1969.

[20] See CSC FPM Supp. 930–72 at 1, providing that non-reservists occupying technician positions may continue to serve in their jobs after the ART reorganization, although they are subject to reassignment as reservists become available to perform the technicians duties.

[21] Letter From John E. Bayler, Chief, Employment Services Branch to Frances Morton, Jan. 5, 1968; letter from John E. Bayler to Samuel Minnich, May 14, 1969.

LAW

This action was filed January 12, 1970, prior to the enactment of the District of Columbia Court Reform and Criminal Procedures Act of 1970. 11 D.C. Code § 101 et seq. (1973 ed.). Jurisdiction is therefore conferred on this Court pursuant to 11 D.C. Code § 521 (1967 ed.). Jurisdiction may also be premised on section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, empowering the district courts to review certain agency actions without regard to the amount in controversy. Pickus v. U.S. Board of Parole, 507 F. 2d 1107 (D.C. Cir. 1974).

Exhaustion of Administrative Remedies

Defendants raise a preliminary issue of the failure of plaintiffs Meadows and Guttenberger to exhaust all available administrative remedies. These two plaintiffs both appealed their RIF actions to the appropriate CSC regional office. They did not, however, take a further appeal to the Board of Appeals and Review, as they were entitled to do under the civil service regulations. 5 C.F.R. § 772.307. Defendants contend that disregard for this final appeal procedure barred Meadows and Guttenberger from availing themselves of judicial resolution of their claims. See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S. Ct. 459, 82 L.Ed. 638 (1938).

Although a plaintiff is not required to pursue futile administrative procedures before initiating judicial action, Lodge, 1858, AFGE v. Paine, 141 U.S. App. D.C. 152, 436 F. 2d 882 (1970), plaintiffs do not assert that the appeal procedures of the CSC were ineffectual in rectifying their alleged grievances. Nor could they argue that the Board of Appeals previous rejection of plaintiff Rolf's challenge to the ART program excused them from

further administrative action.[22] Although the BAR rejected Rolf's claim that the Air Force ART program *per se* was in violation of the civil service laws, this determination did not foreclose all further challenges to the implementation of the program at other Army and Air Force facilities. Any RIF action will usually present distinct factual issues peculiar to each affected employee, especially with respect to his or her competitive area, competitive level, seniority and possible veteran preference. In Meadow's and Guttenberger's initial appeals they specifically attacked the mechanics of the ART reorganization at the McGuire Air Force Base, alleging that there was an improper transfer of non-ART job functions to ART positions. These issues were not resolved by Rolf's appeal of a RIF action instituted at another Air Force facility. For these reasons the Court concludes that plaintiffs Meadows and Guttenberger failed to exhaust their administrative remedies by not appealing to the BAR and precluded from litigating their claims before this Court. McKart v. United States, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969); Young v. Higby, 95 U.S.App.D.C. 122, 220 F. 2d 487 (1955). These plaintiffs' claims are hereby dismissed.

Defendants have also argued that plaintiff Minnich failed to exhaust his administrative remedies by not seeking a waiver of the age provisions barring his transfer into the active reserves. Army Regulation AF 140—315 allows for such waiver upon a showing that the employee is "indispensable" to the ART program and has

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[22] The BAR's decision is Rolf's case was entered on August 7, 1969. Rejections of Guttenberger's and Meadow's appeals by the New York regional office were dated August 14, 1969.

at least five years remaining before mandatory removal from active status. The administrative record filed with defendants' summary judgments motion indicates, however, that Minnich could not transfer into the active reserves precisely because he had passed the mandatory retirement age. AF 140—315 would seem not to apply. In addition, neither plaintiff nor defendants establish any basis for Minnich's indispensability to the ART program. Any attempt to seek a waiver under the regulation would have been a meaningless gesture which this plaintiff was not required to pursue. See Lodge 1858, AFGE v. Paine, supra.

Civil Service Commission's Authority To Establish The ART Programs

This is not the first case in which the legality of the ART programs has been in issue. See Baum v. Zuckert, 342 F. 2d 145 (6th Cir. 1965); Chloros v. Zuckert, C.A. No. 1233—64 (D. D.C. Order granting summary judgment to defendants March 17, 1965); Horvath v. Commissioners of Civil Service, No. 64 C 1312 (N.D. Ill. Order granting summary judgment to defendants Oct. 14, 1965). In each of these actions the court rejected challenges to the ART programs. In spite of these precedents, a detailed reexamination of the issues raised by plaintiffs in this action is warranted by the enactment, subsequent to the entry of the above-cited decisions, of legislation creating a National Guard technician program similar to the ones adopted by joint approval of the CSC, Army and Air Force. National Guard Technicians Act of 1968, 32 U.S.C. § 709.[23]

[23] The legality of the National Guard Act was upheld in Local 371, AFL-CIO v. Brink, C.A. No. 2688-70 (D.D.C. Order June 22, 1972).

The Department of Defense is an executive agency authorized to employ civil servants to the extent the necessary funds have been appropriated by Congress. 5 U.S.C. § 3101. The military departments of the Army and Air Force have the same statutory authority. *Id.* When operating within the confines of the civil service laws the military departments, as other components of the executive branch, must abide by the definitional requirements of Title 5, including section 2101, which provides:

> [the civil service] consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services . . .

The uniformed services include, *inter alia*, the Army and Air Force. 5 U.S.C. § 2102(2).

An initial issue presented by the agreements between the two military departments and the CSC, and inferentially raised by plaintiffs, is whether the ART programs unlawfully assign civilian personnel to the performance of military functions, thereby ignoring the statutory barrier between the civil and uniformed services. Section 2102 suggests that an Army or Air Force employee who is engaged in military duties (the extreme example being combat functions) could not be considered a civil servant.

Acceptance of the latter proposition, however, does not compel the conclusion that when military personnel perform the same duties assigned to civilians the civil service status of the latter is tainted. Apart from the easily identifiable combat roles, the duties of a given job do not alone determine whether an employee is in the uniformed or civil service. To take an easy example,

there would seem to be no problem with having civilian clerk typists perform their jobs in coordination with military personnel who fulfill their military obligations as clerk/typists. Similarly, reserve technicians who are employed as flight mechanics do not become *de facto* uniformed personnel merely because these same job functions have been or continue to be performed by members of the military.

As to the mechanics of the ART operation, the agreements between the agencies explicitly distinguish between the ART employees' military and civilian functions. As with non-ART employees, the technicians' duties and responsibilities during the working day are governed by the civil service laws and regulations. Promotions, RIFs, etc. are subject to civil service procedures. When working in their civilian capacities, the technicians do not wear military uniforms and are not required to follow the rules of "military courtesy."[24]

As far as practicable, the CSC has taken precautionary steps to ensure the separation of military and civilian obligations. In this respect, the technicians are in a position similar to other civil service employees who voluntarily maintain membership in the reserves. Participation in reserve activities is not *per se* an unlawful interference with an employee's status as a civil servant. The Court further concludes that compulsory membership in the reserves should be viewed as a condition of employment akin to other prerequisites imposed on employees for entrance into and maintenance of their positions (e.g., an attorney's admission to practice before a Bar). This condition is not violative of the statutory definition of the civil service.

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[24]See Memorandum of Understanding, paras. 6, 7.

Plaintiffs point to two additional statutory provisions which allegedly indicate Congress' concern for the separation of military and civilian functions. First is 5 U.S.C. §2105(c):

> An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of—
>
> (1) laws (other than subchapter IV of chapter 53 and sections 5550 and 7154 of this title) administered by the Civil Service Commission . . . [25]

The simple response to the proposed applicability of this provision in that the technicians are paid from appropriated funds[26] and therefore are not included within this narrow exception to the general rule that civilian employees of the military departments are subject to the civil service laws. Further, the reserve technicians do not fit the description of employees who are referred to in this provision. The ART programs certainly are not "conducted for the comfort, pleasure, contentment, and

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[25]See Bowen v. Culotta, 294 F. Supp. 183 (E.D. Va. 1968) for an explanation of nonappropriated fund activities.

[26]See testimony of Maj. Gen. Tom E. Marchbanks, July 29, 1969, Hearings on the Department of Defense Appropriations before the House Subcommittee of the Committee on Appropriations, 91st Cong., 1st Sess.

mental and physical improvement of personnel of the armed forces."

The second citation proffered by plaintiffs is subsection (d) of the same statute:

> A Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity.

Contrary to plaintiffs' interpretation, this statute merely states that during those times when a reservist is not on active duty, or on active duty only for training purposes, he is not deemed an officer or employee of the United States and may engage in certain activities which might normally be foreclosed to him.[27] There is no implication that reservists may not hold positions in the civil service or that civil servants may not be required to join the reserves as a condition of employment.

Legality of the ART Programs In Light Of the Enactment of the National Guard Technician Act of 1968

When Congress considered the Guard technician bill in 1968 there already existed state technician plans which required membership in the National Guard as a continuing requirement for civilian employment. The federal statute carried over many of the features of these

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[27] For a discussion of this statute see Reservists Committee To Stop The War v. Laird, 323 F. Supp. 833 (D.D.C. 1973), aff'd, 495 F. 2d 1075 (D.C. Cir. 19r2); rev'd 418 U.S. 208, 94 S.Ct. 2962, 4 L.Ed.2d 706; 45 Comp. Gen. 405 (1966).

state programs, including compulsory membership in the Guard, but additionally provided for the inclusion of the technicians in the federal civil service, subject to certain exceptions:

> (d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard . . . .
>
> (f) Sections 2108, 3502, 7511, and 7512 of title 5, United States Code, do not apply to any person employed under this section."[28]

Both the Senate and House Armed Services Committee Reports[29] explained that the primary reason for enactment of the legislation was to convert the National Guard technicians from state employees, who had been paid out of federal funds, to federal civil servants: "In effect, the technicians will become federal employees, receiving the salaries, fringe and retirement benefits, but with certain administrative control regarding employment supervision remaining with the adjutants general of the jurisdiction concerned under regulations prescribed by the Secretary concerned."[30] The purpose

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[28] 32 U.S.C. § 709(d), (f).

[29] S. Rep. No. 1446, 90th Cong., 2d Sess (1968); H.R. Rep. No. 1823, 90th Cong., 2d Sess. (1968), U.S. Code Cong. & Admin. News 1968, p. 3318.

[30] S. Rep. No. 1446 at 2; H.R. Rep. No. 1823 at 3.

of this changeover to federal status was apparently to create added incentives for the technicians to remain in their government jobs, rather than transferring to more lucrative positions in private industry.[31]

Noting that at the time of consideration of the bill 95% of all Guard technicians were required to be military members of the National Guard, the Senate and House Committees both recommended a continuation of this policy:

> The concept of the technician program is that the technicians will serve concurrently in three different ways: (a) Perform full-time civilian work in their units; (b) perform military training and duty in their units; and (c) be available to enter active Federal service at any time their units are called.[32]

However, it was thought that special provisions should be made to accommodate the peculiar situation wherein civilian status was dependent upon fulfillment of military obligations. For this reason, the 95% of the technicians who were required to hold military positions in the National Guard were placed in a non-competitive status within the civil service. The remaining technicians were placed in the competitive service.

The inferences to be drawn from the passage of this Act are not clear-cut. Plaintiff argues initially that the placement of the Guard technician programs outside the competitive service indicates their peculiar status and the special problems they pose for the efficient operation

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[31]See statement of Maj. Gen. Francis S. Greenlief, July 29, 1969, Hearings on the Department of Defense Appropriations before the House Subcommittee of the Committee on Appropriations, 91st Cong., 1st Sess.

[32] S. Rep. No. 1446 at 2; H. R. Rep. No. 1823 at 2.

of the civil service. From this interpretation plaintiffs argue that any similar programs, such as the ones at issue in this case, must be established pursuant to Congressional authorization and that the CSC's independent approval of the Army and Air Force ART programs as part of the competitive service was contrary to Congress' intent. The Court disagrees.

Pursuant to section 3301 of Title 5 the President is responsible for devising standards by which individuals are to be admitted into the civil service and the duties to be performed by civil service employees. Executive Order No. 10577[33] delegates this authority to the CSC and directs the Commission to establish positions in the competitive and excepted services:

> Sec. 1.2. *Extent of the competitive service.* The competitive service shall include: (a) All civilian positions in the executive branch of the Government unless specifically excepted therefrom by or pursuant to statute or by the Civil Service Commission . . . The Commission is authorized and directed to determine finally whether a position is in the competitive service.
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> * * * * * *
>
> Sec. 2.1. *Competitive examinations and eligible registers* . . . . The Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other

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[33]19 Fed. Reg. 7521 (Nov. 1954). There have been numerous amendments to the original Order, but none affect the provisions quoted herein.

requirements which applicants must meet to be admitted to or rated in examinations.

* * * * * *

Sec. 6.1 *Authority to except positions from the competitive service.* (a) The Commission is authorized to except positions from the competitive service whenever it determines that appointments thereto through competitive examination are not practicable.

Pursuant to 5 U.S.C. §3101 the Army and Air Force were entitled to employ civilian ART personnel. The CSC had the power under 5 U.S.C. §3301 and Executive Order No. 10577 to determine whether or not the ART employees should be within the competitive service and which qualifications and conditions of employment should be imposed. The agencies exercised their authority to establish the ART programs long before the National Guard program was incorporated within the Federal civil service. Unless clearly contrary to law, the Court should follow the CSC's interpretation of these statutory provisions. Udall v. Tallman, 380 U.S. 1, 85 S. Ct. 792, 13 L.Ed.2d 616 (1965).

When Congress addressed itself to the issue of Guard technicians it indicated through the legislative reports that placement of the technicians in non-competitive status was necessitated by the military obligations accompanying the job. However, this conclusion was not framed in a manner suggesting that the non-competitive status was compelled by force of law. Rather, the reports point to the need to maintain the efficient operation of the technician programs and the civil service as the reason for the decision. No mention was made of the already existing Army and Air Force programs. Thus the passage of the National Guard Act does not support the

inference that Congress was expressing the view that the Army and Air Force programs were illegal or that the CSC had abused its broad discretionary powers under section 3301 and Executive Order No. 10577. Accordingly, it is the conclusion of the Court that the inclusion of the Army and Air Force technicians within the competitive service and the creation of a separate competitive level for the ART employees was in accordance with the civil service laws and was not arbitrary, capricious or an abuse of discretion.[34]

Plaintiffs further argue that even if the technicians have been properly placed within the competitive service, the definition of the separate competitive levels for ART employees results in the violation of special statutory benefits to which preference eligible employees are entitled. See 5 U.S.C. §§3312, 3351, 3363, 3504. Plaintiffs contend that only Congress may accomplish this abrogation of statutory rights, again drawing support for this position from the National Guard Technician Act, which specifically provided for the exemption of the Guard technicians from certain preference eligible benefits. 32 U.S.C. §709(f).

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[34]Plaintiffs' reliance on section 3502 of Title 5, which directs the CSC to prescribe regulations which will give "due effect" to military preference in any RIF action, is misplaced. The Commission is g.. ''ed broad discretion in devising a workable classification system which will accommodate the needs of the executive branch in a RIF action with the rights of preference eligible employees. See Hilton v. Forrestal, 83 U.S. App. D.C. 44, 165 F. 2d 251 (1947), aff'd, 334 U.S. 323, 68 S. Ct. 1020, 92 L. Ed. 1416. Further, veterans' rights under § 3502 operate only *within* the employee's competitive level. This provision does not allow a preference eligible employee to displace employees in other competitive levels. Novogroski v. United States, 153 F. Supp. 421 (Ct. Cl. 1957).

Section 3312 of Title 5 provides:

> In determining qualifications of a preference eligible for examination for, appointment in, or reinstatement in the competitive service, the Civil Service Commission or other examining agency shall waive—
>
> (1) requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position; and
>
> (2) physical requirements if, in the opinion of the Commission or other examining agency, after considering the recommmendation of an accredited physician, the preference eligible is physically able to perform efficiently the duties of the position.

A preference eligible is similarly entitled to a waiver of these requirements when being considered for promotion to, transfer to or retention in a position in the competitive service. 5 U.S.C. §§ 3351, 3363 and 3504. These waivers are mandatory, except to the extent that the Commission is to determine whether these requirements may be essential to the performance of the duties of the position.[35]

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[35]The conflict between the operation of the ART programs and these provisions of the Veterans Preference Act is exemplified in the claims of plaintiffs Minnich and Rolf, both of whom are preference eligible employees. Minnich was employed in the Army ART program when the initial reorganization was made, but was denied promotion to a higher position because he failed to satisfy the age requirements of the active reserves. Rolf sought transfer to an Air Force ART position after he received notice of a RIF affecting his non-ART job, but was rejected because he could not meet the physical requirements for entrance into the Reserves.

Plaintiffs' reference to Ms. Morton's situation is inappropriate in this context, since she is not a preference eligible employee.

Participation in the active reserves as a condition of civil service employment does not itself interfere with veterans' rights under the Act. The decision whether or not to join and remain in the reserves is within the control of the job applicant. Reserve membership is something which the prospective employee is free to embrace or reject. See Baum v. Zuckert, supra. However, when a veteran seeks entrance or promotion into an ART position and is rejected on the basis of age, height, weight or physical disability, he is entitled to the special considerations set forth in sections 3312, 3351, 3363 and 3504 of the civil service laws.

The Commission has rejected plaintiffs' claims for preference under these provisions on the ground that reserve membership is a condition of employment which is essential to the performance of the duties of a reserve technician. If an applicant cannot satisfy the age requirements of the reserves, for example, then it is the agency's contention that a waiver is not justified because the employee would not be able to perform all of the duties of the technician position.

Although an argument may be made that the statute's focus on the *duties* of the position should be distinguished from the fulfillment of concomitant *conditions* of employment (such as the reserve membership requirement), the courts have traditionally accorded great deference to the interpretation of a statute by the agency charged with its enforcement. Udall v. Tallman, supra. Additional weight should be attached to the agency interpretation when Congress has had the opportunity to alter the administrative construction and has refused to do so. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969); Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271, 14 L.Ed.2d 179 (1965).

The Air Force and Army technician programs have been in force since 1957 and 1960, respectively. The documents and agreements establishing the two programs clearly set forth the reserve membership requirements and the effect they have on potential and incumbent employees. In congressional hearings on appropriations military personnel have testified on numerous occasions about the reserve technician plan and the manner in which it is operated.[36] Although we should refrain from inferring too much from congressional inactivity, it is relevant that the technician plan has been in effect for such a long period of time without any congressional interference. To the contrary, when Congress was confronted with an analogous situation in the National Guard, it opted to follow the lead of the CSC and excluded the reserve technicians from the benefits of the Veterans Preference Act. In this light, the Court concludes that the Commission's interpretation of the Veterans Preference Act, sections 3312, 3351, 3363 and 3504 in particular, and its application to the reserve technician plans is not contrary to law and not arbitrary or capricious.

JUDGMENT

Upon consideration of defendants' motion for summary judgment and plaintiffs' cross-motion for summary judgment, the memoranda of points and authorities in

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[36]See, e.g., Testimony of Brig. Gen. Felix L. Vidal, March 3, 1959, Hearings on the Department of Defense Appropriations before the House Subcommittee of the Committee on Appropriations, 86th Cong., 1st Sess.; Testimony of Maj. Gen. Joseph J. Nazarro and Brig. Gen. Felix L. Vidal, March 20, 1958, Hearings on the Department of Defense Appropriations before the House Subcommittee of the Committee on Appropriations, 85 Cong., 2d Sess.

support thereof and in opposition thereto, and it appearing to the Court, for the reasons set forth in the accompanying Memorandum Opinion, that there is no genuine issue as to the material facts in this case and that defendants are entitled to judgment as a matter of law, it is by the Court this 21st day of November, 1974.

Ordered that defendants' motion for summary judgment be, and the same hereby is, granted, and it is further

Ordered that plaintiffs' motion for summary judgment be, and the same hereby is, denied, and it is further

Adjudged, ordered and decreed that judgment be, and the same hereby is, entered for defendants against the plaintiffs.

Supreme Court, U. S.
FILED
APR 8 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-905

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., *Petitioners,*

v.

SECRETARY OF THE ARMY, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Constitutional question raised by the petition for certiorari in this case is far too crucial to the federal Civil Service System and to the separation of powers between the Executive and Congressional branches of our Government to be lost in the sea of confusion created by the Government's brief in opposition. Indeed, as mentioned before, the same vague confusion so thoroughly engulfed the courts below that they ulti-

mately rendered decisions herein which nowhere even remotely refer to or dispose of the unavoidable, fundamental Constitutional question presented by this case under Article I, Section 8 of the Constitution and the Fifth Amendment.[1]

At page 4 of its brief, the Government states: "The district court concluded that the requirement of membership in the reserves *does not conflict with any of the provisions of the civil service laws*, and it entered summary judgment for respondents". But, petitioners contend the requirement of membership in the reserves and forced military-combat service for Civil Service job incumbents *conflicts with Article I, Section 8 of the Constitution* and the *Fifth Amendment*—because Congress nowhere authorized the imposition of such military requirements on *Civil Service job incumbents* by *statute*. They contend further, therefore, that it was thus *unconstitutional* for the Civil Service Commission to impose such military requirements by administrative fiat only. *Ergo,* the district court completely missed the crucial point raised by this case, and the Government is now asking this Court blindly to follow suit.

At page 4 of its brief, the Government states further: "The court of appeals affirmed. It concluded that the Reserve Technician Programs were a rational strategy to provide the reserves with a 'hard core' of highly skilled reservists available for duty." But, petitioners contend that, under Article I, Section 8 of the Constitution, Congress and Congress *alone* has the power to decide whether it is rational or irrational to force thousands of Civil Service job incumbents, such as *clerks, typists, accountants, truck drivers* etc., suddenly to join the military and makes themselves available for combat duty—and petitioners assert that Congress has never extended those constitutional powers to the Civil Service Commission.

[1] The decisions below fail even to mention the Constitutional question under Article I, Section 8 and the Fifth Amendment albeit the Government concedes in its brief in opposition before this Court, at page 2:

> "Petitioners commenced this action . . . to challenge the Reserve Technician Programs of the Army and Air Force on *both Constitutional* and statutory grounds."

The Government's brief proceeds next to try to create the "sea of confusion" mentioned above. It states, at page 4:

> "Petitioners apparently concede that the Army and Air Force could require all technicians for reserve units to be members of the uniformed services. They also apparently concede that the Army and Air Force could establish programs under which some technicians were uniformed military personnel and others were civilian civil service personnel. But, they contend, once the Army and Air Force decided to *allow* civilians to be employed as reserve unit technicians, they were precluded by statutes from requiring those civilians to assume, as a condition of employment, any obligation to accompany their reserve units in time of emergency. This position is unsound." (Emphasis supplied)

But, that is not petitioners' position at all—and the "apparent concessions" attributed to petitioners are completely distorted and erroneous. If Congress, *by statute,* authorizes the Army and Air Force to require all the thousands of typists, clerks, accountants, etc. working for reserve units to be members of the uniformed services, then of course *all* such employees *must* join the military to serve lawfully in those capacities. Similarly, if Congress, *by statute,* authorizes the Army

and Air Force to establish programs pursuant to which some of those thousands of administrative employees should be military personnel while others are civilian Civil Service personnel, then also that system, thus decreed by Congress, must prevail.

But here, Congress has completely failed to pass any such statute. Nevertheless, the Civil Service Commission has *unconstitutionally required* thousands of Civil Service clerks, typists, truck drivers etc.—the overwhelming majority of whom have long years of exemplary employment records in the Civil Service—either to qualify for and join the military and expose themselves to combat service in the event of an emergency or stand to lose their Civil Service jobs, or their Civil Service statutory job retention and promotion rights.

Thus, it is totally misleading and wrong for the Government to suggest in its brief (at page 4) that the "Army and Air Force decided *to allow* civilians to be employed as reserve unit technicians". On the contrary, here the Army, Air Force and Civil Service Commission *forced* thousands of Civil Service job incumbents, with long records of satisfactory service, either to join the military or face the loss of either their jobs or their statutory job rights.

* * *

In its brief, the Government again points, as did the court of appeals, to Title 5 U.S.C. 3101 and 3301 as alleged statutory authority for what the Civil Service Commission has done in this case to force thousands of Civil Service incumbents either to join the military or lose their jobs or statutory job retention and promotion rights.

A mere reading of those two sections of Title 5 makes it crystal clear that neither provision even remotely

clothes the Commission with any such authority. 5 U.S.C. 3101 simply authorizes *all federal agencies* to employ as many Civil Service employees as Congress appropriates from year to year.

5 U.S.C. 3301, in turn, is strictly limited, by its own terms, to the "*admission of individuals into the civil service*" and to "*applicants*", *not Civil Service job incumbents*—but even then, in no sense or manner does it clothe (or was it intended to clothe) the Civil Service Commission with the power to compel military service as a condition of federal Civil Service employment. In fact, never before has the Civil Service Commission attempted to exercise any such *military authority*, and there is nothing in the legislative history of 5 U.S.C. 3101 or 3301 to suggest that Congress had any such intent or purpose when it enacted those provisions.

And, of course, if the Court agrees with petitioners in this regard, then it must rule, we respectfully submit, that the Civil Service Commission's actions in this case ran afoul of Article I, Section 8 of the Constitution, as well as the Fifth Amendment (*Hampton* v. *Mow Sun Wong*, 96 S.Ct. 1895 (1976), and cases cited therein).

Thus, at page 6 of its brief, the Government completely misses the target by arguing: "The Reserve Technician Programs do not conflict with any statute." As pointed out hereinabove, they do more than just that—they conflict with the Constitution of the United States.[2]

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[2] It is equally specious for the Government to argue, at page 6, that "Nothing in the statutes prevents civil service employees from joining the reserves". Such *voluntary action* is not in issue here. Rather, the question in this case is whether the Civil Service Commission may constitutionally *compel* Civil Service job incumbents to join the military.

Finally, the National Guard Technicians Act, 32 U.S.C. 709, has absolutely nothing to do with this case, except to reemphasize that since the Constitution required an Act of Congress to establish that National Guard program, clearly an Act of Congress is equally necessary under the Constitution before thousands of Civil Service employees can be required to join the military and face combat duty in the event of emergency as a price for continuing to hold Civil Service positions they have successfully performed for years.

Certainly, the National Guard Technicians Act did not directly or indirectly license any such federal action, and of course, the Government in reality does not make any such contention.[3]

In *Tennessee* v. *Dunlop*, 426 U.S. 312, this Court upheld the constitutionality of the National Guard Technicians Act. Here, there is no such statute to uphold—because there is no such statute. The challenged programs are thus void under Article I, Section 8 and the Fifth Amendment.

CONCLUSION

The Petition For Certiorari should be granted.

Respectfully submitted:

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[3] The Government here relies, and in the courts below relied, exclusively on 5 U.S.C. 3101 and 3301, as stated in its brief at page 5.